(23,900)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1914.

## No. 277.

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, ET AL., PLAINTIFFS IN ERROR,

*vs.*

PEGGY WOODWARD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a *Return to Writ.*

UNITED STATES OF AMERICA,
*Supreme Court of Oklahoma. ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Oklahoma, in Oklahoma City, Oklahoma, this 4th day of October, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
*Clerk of the Supreme Court of Oklahoma,*
By JESSIE PARDOE, *Deputy.*

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Pegyy Woodward and Bailey, Wyand & Moon, her attorneys:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Oklahoma, wherein Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders are plaintiffs in error, and appellants, and you are defendant in error, to show cause, if any there be, why the said judgment in the writ of error mentioned should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 1st day of October, A. D. 1913, and of the Independence of the United States the one hundred and thirty-seventh.

SAMUEL W. HAYES,
*Chief Justice of the Supreme Court of said State.*

Attest:
W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

Service of the foregoing is hereby acknowledged to have been made upon Peggy Woodward this 2nd day of October, 1913.

DE ROSS BAILEY,
*Attorneys for Peggy Woodward.*

[Endorsed:] Patsy Perryman vs. Peggy Woodward. Filed Oct. 3, 1913. W. H. L. Campbell, Clerk.

1—277

2 In the Supreme Court of the State of Oklahoma.

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Paintiffs in Error,

vs.

PEGGY WOODWARD, Defendant in Error.

*Petition for Writ of Error.*

Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, the plaintiffs in error in the above entitled cause, and each of them, feeling themselves aggrieved by the order, judgment and decree of affirmance entered in said cause on the — day of June, 1913, affirming the judgment rendered in the District Court of the Third Judicial District, sitting in and for Muskogee County, State of Oklahoma, on the 30th day of July, 1909, before the Hon. John H. King, Judge of said Court; come now by Benjamin Martin, Esq., Villard Martin, Esq., B. B. Blakeney, Esq., and J. H. Maxey, Esq., their attorneys, and petition said court for an order allowing said plaintiffs in error in the said Supreme Court of the State of Oklahoma to prosecute a writ of error to the Honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiffs in error shall give and furnish on said writ of error, and that upon the giving of such security all further proceeding in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States; and also petition this
3 Honorable Court to order all the evidence of the witnesses taken herein to be certified in the form the same now appears in the case made and record of appeal in this court and directing that the Clerk certify to such record in said cause now on file in the Supreme Court of said state. And your petitioners will ever pray.

BENJ. MARTIN,
VILLARD MARTIN,
B. B. BLAKENEY,
J. H. MAXEY,
*Attorneys for Plaintiffs in Error.*

Filed Sep. 19, 1913. W. H. L. Campbell, Clerk.

4 In the Supreme Court of the State of Oklahoma.

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs in Error,

vs.

PEGGY WOODWARD, Defendant in Error.

*Assignment of Errors.*

Comes now the plaintiffs in error, and each of them, and file the following assignment of errors, upon which they and each of them will rely on their prosecution of the writ of error in the above entitled cause from the decretal order and decree made by this Court onthe — day of June, 1913, in the above entitled cause.

First. In the affirming of the judgment and final decree entered in the District Court for Muskogee County, in said State of Oklahoma, on the 30th day of July, 1909, at a judicial day of the May term of said District Court in and for the Third Judicial District of said State.

Second. In not making, rendering and entering a decree and judgment in favor of said plaintiffs in error, and each of them, Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, and against said defendant, Peggy Woodward, reversing the judgment rendered in the said District Court aforesaid, and entering a judgment in said cause in favor of the plaintiffs in error, Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, and against the defendant in error, Peggy Woodward.

Third. In holding and deciding that Section 3 of Chapter 1 of Mansfield's Digest of the Statutes of Arkansas, was not locally inapplicable and was extended over and put in force in the In-
5 dian Territory by the Act of Congress of May 2, 1890 (23 Stat. L. 81), although repugnant to the constitution of Arkansas so far as it affected homesteads; and an order of the probate court vesting the entire estate of a deceased person in the widow of the deceased, was valid and effective where the entire estate did not exceed three hundred dollars in value, though a portion of the estate consisted of improvements on a town lot occupied as a home.

Fourth. In holding and deciding that the Act of Congress of May 2, 1890 (23 Stat. L. 81), which provided that "certain general laws of the State of Oklahoma in force at the close of the session of the general assembly of that state of 1883, as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable nor in conflict with this Act, nor with any law of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in Indian Territory until Congress shall otherwise provide," did put into force and effect and extend over the Indian Territory certain general laws of the State of Arkansas which were not in force at the close of the session of the general assembly of that state of

1883, because the same were published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas; that is to say: That Section 3 of Chapter 1 of Mansfield's Digest of the statutes of Arkansas had been repealed by Section 6 of Art. 9 of the constitution of the state of Arkansas prior to 1883 and was not in force in said state at the close of the session of the general assembly of that state of 1883 and was not extended and put in force in the Indian Territory.

6 Fifth. The Court erred in holding and deciding that under the law in force in the Indian Territory prior to Statehood, where a copy of a judgment was offered in evidence before a Master in Chancery, excluded by him and exceptions saved by the party offering it, it was not error for the Court, upon sustaining the exceptions to the report of the master, to consider the judgment so offered without re-referring the case to the master, where the judgment was copied into the report of the master and was properly admissible in evidence.

Sixth. The Court erred in holding and deciding that where a town lot in the Creek Tribe was scheduled to the owner of the improvements and after his death was sold by the person in whom the law vested the improvements, and the payments due the Tribe were paid by such purchaser, the patent from the Tribe in the name of the deceased owner of the improvements inured to and carried title to such purchaser.

In order that the foregoing assignments of error may be and appear of record the plaintiffs in error, Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders present the same to the Court, and pray that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided; and the plaintiffs in error pray the reversal of the decreetal order and decree of affirmance made and entered by the said Supreme Court of the State of Oklahoma.

BENJ. MARTIN,
VILLIARD MARTIN,
B. B. BLAKENEY,
J. H. MAXEY,
*Attorneys for Plaintiffs in Error.*

Filed Sep. 19, 1913. W. H. L. Campbell, Clerk.

7 At a Stated Term, to-wit, the —— Term, A. D. 1913, of the Supreme Court of the State of Oklahoma, Held at the Court-room of the Supreme Court in the City of Oklahoma City, State of Oklahoma, on the — Day of July, 1913.

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs in Error,

vs.

PEGGY WOODWARD, Defendant in Error.

*Order Allowing Writ of Error.*

Upon motion of Benjamin Martin, Esq., Villard Martin, Esq., B. B. Blakeney, Esq., and J. H. Maxey, Esq., attorneys for the plaintiffs in error, and upon filing a petition for writ of error and assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the order, judgment and decree of affirmance heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at Two Thousand Dollars.

It is further ordered that a transcript of the record be forthwith transmitted to the Honorable, the said Supreme Court of the United States, said record to consist of the transcript of the record heretofore used on appeal to this, the Supreme Court of said State, including the evidence of witnesses in the form that the same now appears in the record in this Court, together with the transcript of

8 all proceedings had and taken in the case subsequent to the said appeal to the Supreme Court of said State.

SAMUEL W. HAYES,
*Chief Justice.*

Attest:
[SEAL.]

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Filed Sep. 19, 1913. W. H. L. Campbell, Clerk.

Endorsed: No. 1678. Patsy Perryman et al. vs. Peggy Woodward. Order allowing Writ of Error.

9 Filed Sep. 26, 1913. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law and equity of said State in which a decision could be had in the said suit between Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam

Saunders and William Saunders and Peggy Woodward, wherein was drawn in question the validity of certain statutes of the United States, and of certain rights conferred and protected by the statutes of the United States and treaties with the Five Civilized Tribes of Indians and the decision was against their validity and denying such rights and wherein was drawn in question the construction of the Constitution and Statutes of the United States and the treaties and agreements of the United States with the Five Civilized Tribes of Indians and the decision was against the title, right, privileges and exemption and each thereof specially set up and claimed under such clause of the said Constitution, statutes and treaties and agreements; a manifest error hath happened to the great injury and damage of Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders as in their complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the
10 said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23d day of September, one thousand nine hundred and thirteen.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE.
*Clerk District Court United States, Western District of Oklahoma.*

Allowed.
SAMUEL W. HAYES,
*Chief Justice Supreme Court of Oklahoma.*

11 In the Supreme Court of the State of Oklahoma.

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

*Bond.*

Know All Men by These Presents: That we, Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, as principal- and G. E. Burford as sureties, are

held and firmly bound unto the defendant in error, Peggy Woodward, in the full and just sum of Two Thousand Dollars. to be paid to the said Peggy Woodward, her certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally and firmly by these presents.

Sealed with our seals and dated this 30 day of Sept., in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the Supreme Court of the State of Oklahoma. in a suit pending in said court between Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, as plaintiffs in error, and Peggy Woodward, as defendant in error, a general order and judgment was rendered against the said plaintiffs in error, affirming the certain judgment and decree entered on the 30th day of July, 1909, in the District Court of Muskogee County, in said state, and the said Patsy Perryman, Clory Cross, Isac Saunders, Fred Saunders, Sam
12 Saunders and William Saunders. plaintiffs in error, having obtained from the said court and the Chief Justice thereof a writ of error and an order allowing an appeal to review its said order and judgment in the aforesaid suit, and a citation directed to the said Peggy Woodward and her attorneys of record is about to be issued, citing and admonishing her to be and appear in the Supreme Court of the United States to be holden at the City of Washington, District of Columbia;

Now, the nature of the above obligation is such that, if the said Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, plaintiffs in error, shall prosecute their writ of error to effect and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation to be void; otherwise, to remain in full force and effect.

PATSY PERRYMAN,
CLORY CROSS,
ISAAC SAUNDERS,
FRED SAUNDERS,
SAM SAUNDERS,
WILLIAM SAUNDERS,
By BLAKENEY & MAXEY,
*Their Att'ys.*
G. E. BURFORD.

Approved this 30 day of Sept. 1913.

13 STATE OF OKLAHOMA,
*County of Muskogee, ss:*

G. E. Burford, being first duly sworn, on oath deposes and says: That he is a resident of said County and State, and has property situate in the said State over and above all exemptions, debts and liabilities, and subject to execution, in the amount of five thousand

dollars ($5000.00), which said property is described as follows: S. ½ S. E. ¼ N. E. ¼ & N. ½ N. E. ¼ S. E. ¼ Sec. 16 Twp. 15 north Range 18 East 40 acres on north 24th st. adjoining College View Heights an undivided one third interest and the east 36 feet of west 186 feet Lot 3 Block 9 City of Muskogee, Okla. on Okmulgee Ave. an undivided one half interest.

G. E. BURFORD.

Subscribed and sworn to before me this 30 day of Sept. 1913.

[SEAL.] HALLIE WHITAKER,
*Notary Public.*

My commission expires, Nov. 25 1915.

Endorsed: No. 1768. Patsy Perryman et al. vs. Peggy Woodward. Bond. Filed and approved Oct. 1 1913. W. H. L. Campbell, Clerk, By Jessie Pardoe, Deputy.

14 In the Supreme Court of the State of Oklahoma, Guthrie, Oklahoma.

No. 1678.

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

*Petition in Error.*

The said Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, plaintiffs in error, complain of said defendant in error, Peggy Woodward, for that in an action pending in the District Court of Muskogee County, Oklahoma, wherein Patsy Perryman, Clory Cross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders were plaintiffs and Peggy Woodward was defendant, and upon a hearing of said cause before the Court upon the report of the master to whom the same was referred the court sustained the objections of the defendant to said master's report and rendered judgment in favor of said defendant and against the plaintiffs.

A certified copy of the original case made in said case is hereto attached, marked "Exhibit A," and made a part of this petition in error; and the said plaintiffs in error aver that there is error in the said record and proceedings in this to-wit:

(1) Said Court erred in overruling the motion of the plaintiffs in error for a new trial of said cause, and in rendering judgment in favor of defendant in error.

(2) Said Court erred in rendering judgment for the defendant in error which said judgment was contrary to the law.

(3) Said Court erred in rendering judgment for the de-
15 fendant in error which said judgment was contrary to the evidence.

(4) Said Court erred in not confirming the report of the Master filed in said cause.

(5) Said Court erred in holding that the land in controversy in said cause was ever vested in the widow of Squire Sanders.

(6) Said Court erred in finding that the land in controversy was ever the property of Peggy Woodward.

(7) Said Court erred in rendering judgment for the defendant in error because the evidence shows that the land is still the property of the heirs of Squire Sanders, and that the defendants procured a patent to be issued in the name of Squire Sanders conveying the said land to him from the Creek Nation, and there is no proof to sustain the contentions of the defendants that a trust was created thereby in favor of the defendants, or any of them.

(8) Said Court erred in overruling the motion of the plaintiffs in error to strike from the case made all the matters and things contained on pages 33*a*, 33*b* and 33*c* of said casemade.

(9) Said Court erred in signing and settling said case made with pages 33*a*, 33*b* and 33*c* therein inserted.

Wherefore the plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiffs in error and against the defendant in error upon the finding of the Master to whom said cause was referred, and that the plaintiffs in error be restored to all rights that they have lost by the rendition of such judgment, and for such other relief as to the Court may seem just.

PATSY PERRYMAN,
CLORY GROSS,
ISAAC SAUNDERS,
FRED SAUNDERS,
SAM SAUNDERS,
WILLIAM SAUNDERS,
By GIBSON & THURMAN,
BENJ. MARTIN,
*Attorneys.*

(Filed May 12 1910. W. H. L. Campbell, Clerk.)

16 *Case Made.*

In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

No. 1678.

PATSY PERRYMAN et al.
vs.
PEGGY WOODWARD.

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17 *Case Made.*

STATE OF OKLAHOMA,
*County of Muskogee, ss:*

In the District Court of the Third Judicial District, Muskogee County, Oklahoma.

Equity. No. 6939.

PATSY PERRYMAN, CLORY GROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs,
vs.
PEGGY WOODWARD, Defendant.

Be it remembered, That heretofore, to-wit: On the 19th day of September, 1906, said plaintiffs commenced their action against said defendant by filing complaint in equity in the United States Court for the Western District, Indian Territory, at Muskogee, Indian Territory, of which Court the District Court for the Third Judicial District of Muskogee County, Oklahoma, is successor. Said complaint is in words and figures as follows, to-wit:

18 In the United States Court for the Western District of Indian Territory, October Term, 1906, Sitting at Muskogee.

No. —. Equity.

PATSY PERRYMAN, CLORY GROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs,
vs.
PEGGY WOODWARD, Defendant.

*Complaint in Equity.*

To the Honorable William R. Lawrence, Judge of the United States Court for the Western District of Indian Territory, in Chancery sitting:

Your orators Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, and William Saunders, the plaintiffs, by Thomas & Foreman, their attorneys, complain of Peggy Woodward, the defendant, and for cause of complaint allege the following wrongs done and injuries committed by the said defendant in and against the said plaintiffs.

I.

Your orators represent unto your Honor that the plaintiffs, Patsy Perryman, Clory Gross, Isaac Saunders, and Sam Saunders are residents of the Western District of Indian Territory, their Post office address being Muskogee, Indian Territory; that the plaintiffs

Fred Saunders and William Saunders are residents of the Western District of Indian Territory, their post office address being Braggs, Indian Territory. That the defendant Peggy Woodward is a resident of the Western District of Indian Territory, her post office address being Muskogee, and that Muskogee is the nearest point to the residence of the defendant at which a United States Court is held.

II.

Your orators further represent unto your Honor that they are the children of Squire Saunders, deceased, who departed this life at Muskogee, on the 22nd day of October, 1900; that the said Squire Saunders died intestate; that he left him surviving as his
19 sole heirs at law said children Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, and William Saunders. That at the time of his death the said Squire Saunders was the owner in fee simple of Lot ten in block two hundred and forty-eight, in the City of Muskogee; that he purchased said property from the Creek Nation in conformity with law, and that a copy of the deed or patent issued to him is hereto attached marked "Exhibit A," and is hereby made a part of this complaint.

III.

That each of your orators is the owner of an undivided one-sixth interest in, or part of, said Lot ten, Block two hundred and forty-eight, in the City of Muskogee, Indian Territory, that said lot cannot be partitioned without great prejudice to the owners thereof.

IV.

Your orators further represent unto your Honor that the defendant Peggy Woodward has possession of said Lot 10, in Block 248 in the City of Muskogee, claiming some right or interest therein, the nature of which is to your orators unknown; that she has collected as rent of said property a large sum of money amounting in the aggregate—as your orators have been informed—to the sum of $300.00; but, your orators aver that the said defendant has no legal right to, or interest in, said premises, but that she is holding possession of the same unlawfully and against the will of your orators, the legal owners thereof, and is and has been for several years unlawfully appropriating to her own use the income from said property.

V.

In consideration of the premises, and as your orators are without remedy save in this Honorable Court of Equity where such matters are properly cognizable, they pray for right and justice, and to that end make the said Peggy Woodward party defendant to this action. They pray that the usual process of this Court be issued directed to the United States Marshall for the Western District of Indian Territory, commanding him to summon the said defendant to be and

appear before this Honorable Court on a day to be fixed by
20 the Court—as the law directs—and that then and there said defendant be required to full, true and perfect answers to the matters and things charged and alleged against her in this complaint, including a full discovery of the amount of money collected by her as rental together with the value of the improvements removed by her from said premises. And that upon a final hearing hereof—the proof sustaining the charges and allegations herein contained—your Honor will find, order, adjudge and decree as follows:

First. That Squire Saunders, was, in his life time, the owner in fee simple of Lot ten in Block two hundred and forty-eight, in the City of Muskogee, Indian Territory.

Second. That he departed this life intestate on the 22nd day of October, 1900.

Third. That he left him surviving as his sole heirs at law his children, the plaintiffs herein.

Fourth. The rights, title and interest of each of the parties hereto in and to the said premises.

Fifth. That the defendant be ruled and decreed to bring into Court the rents and profits collected by her from said premises to abide the further order of the Court.

Sixth. That said premises cannot be partitioned without manifest prejudice to the owners thereof and therefore should be sold, and after paying such costs as may be assessed against them—including a reasonable fee for plaintiffs' attorneys, by agreement to be assessed by the Court—the proceeds arising from the sale of said premises including the amount of the rents and profits collected by the defendant, and the value of improvements removed by her, be divided between the parties hereto, as their rights shall be ascertained and determined by this Honorable Court.

Finally: That your Honor will grant unto your orators such other and further relief in the premises as to right and justice appertain, and as to your Honor may seem meet. And in duty bound they will ever pray, etc.

21 PATSY PERRYMAN,
CLORY GROSS,
ISAAC SAUNDERS,
FRED SAUNDERS,
SAM SAUNDERS,
WILLIAM SAUNDERS,
*Paintiffs,*
By THOMAS & FOREMAN,
*Attorneys for Plaintiffs.*

UNITED STATES OF AMERICA,
*Western Judicial District, Indian Territory, ss:*

On this 19th day of September, 1906, personally appeared before me a duly appointed, commissioned and acting Notary Public in and for the Western District of Indian Territory, Patsy Perryman, to me well known, who being by me first duly sworn according to law

on his solemn oath deposes and says: That she is one of the plaintiffs in the above entitled action, that she heard said complaint read; that she is thoroughly acquainted with the contents thereof, and of her own personal knowledge knows that the facts stated and alleged in said petition are true in substance and in fact, as she verily believes.

her
PATSY x PERRYMAN.
mark.

Witness to signature:
J. P. FARNSWORTH.

Subscribed and sworn to before me this 19th day of September, 1906.

[NOTARY SEAL.] JAY P. FARNSWORTH,
*Notary Public.*

My Commission expires August 16th, 1908.

22 "EXHIBIT A."

Copy.

1140 J. A. (June 28, 1901).

The Muskogee (Creek) Nation,

Indian Territory.

To all to whom these presents shall come, Greeting:

Whereas, a townsite commission, heretofore appointed and acting under authority of the Act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, has appraised the lots in the town of Muskogee, Muskogee (Creek) Nation, Indian Territory; and

Whereas, the plat of said town was approved by the Secretary of the Interior on the 4th day of June, 1900 and was duly placed on file and

Whereas, said commission has appraised all of the town lots included in said plat at their true value, excluding improvements, which appraisal has been approved by the Secretary of the Interior; and

Whereas, the said commission has awarded the real estate described hereinbelow to Squire Saunders, who has paid Thirty-seven and 50/100 (37.50) dollars, the full amount of the purchase price, into the treasury of the United States, to the credit of the Muskogee or Creek Nation of Indians, with the United States Indian Agent, at Muskogee, Indian Territory, and is, therefore, entitled to a patent;

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, do, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United

States, hereby grant, sell, and convey unto the said Squire Saunders heirs and assigns forever, all the right, title and interest of the Muskogee (Creek) Nation, aforesaid, in and to Lot numbered 10 in Block numbered 248 in the Town of Muskogee, Muskogee (Creek) Nation, Indian Territory, and according to the plat thereof on file as aforesaid.

23 In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hands and caused the Great Seal of said nation to be affixed at the date hereinafter shown. Date January 26, 1904.

[Great Seal of the Muskogee Nation, I. T.]

P. PORTER,
*Principal Chief of the Muskogee (Creek) Nation.*

Department of the Interior.

Approved Jun- 27, 1904

ETHAN A. HITCHCOCK,
By OLIVER A. PHELPS, *Clerk.*

Said Complaint in Equity endorsed on back as follows: No. 6939 Equity. Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, William Saunders, Plaintiffs, vs. Peggy Woodward, Defendant. Complaint in Equity. Western Dist. Ind Ter. Filed Sep. 19, 1906. R. P. Harrison, Clerk U. S. Courts Thomas & Foreman, Attorneys for Plaintiffs.

And thereafter on Monday the 8th day of October 1906 the same being one of the days of the regular October 1906 term of the United States Court, Western District of Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge, Presiding, comes the defendant, Peggy Woodward, and files her motion that the time allowed her, in which to plead her answer, be extended ten days from this date, and the Court being well and sufficiently advised in the premises doth allow the same.

And thereafter, to-wit: On Thursday, the 18th day of October 1906, the same being one of the regular days of the October 1906 term of the United States Court, Western District of Indian Territory, at Muskogee, the Honorable William R. Lawrence, Judge, presiding, comes the defendant, Peggy Woodward, and files in open Court her answer herein, said answer being in words and figures as follows, to-wit:

United States of America, Indian Territory, Western Judicial District.

No. 6909. Equity.

PATSY PERRYMAN et al.
vs.
PEGGIE WOODWARD, Defendant.

Before Hon. W. R. Lawrence, Judge.

*Answer of Defendant.*

Comes the defendant, Peggie Woodward, by her attorneys Jones and Merriwether, and makes answer to complaint of plaintiffs filed herein, and for such answer states:

(1) That defendant admits the places of residence of plaintiffs and defendants as stated in said complaint of plaintiffs

(2) Defendant admits that said plaintiffs are the heirs of law of one Squire Saunders; defendant denies that the said Squire Saunders was the owner in fee simple of Lot 10, Block two hundred and forty eight, City of Muskogee, I. T., or that the said Squire Saunders at the time of his death had any interest whatever in said lot.

(3) Further answering, defendant says she is the rightful owner of said lot; that Squire Saunders, his heirs at law, the plaintiffs herein, nor any other person but this defendant is the rightful and legal owner of said lot; and that plaintiffs herein nor any other person but defendant has *not* any legal or equitable interest in the said lot 10, block 248, in the City of Muskogee, as aforesaid.

Wherefore, defendant prays that the prayer of plaintiffs' petition be denied; and for all other just and equitable relief.

PEGGY WOODWARD,
By JONES & MERIWETHER,
*Attorneys for Defendant.*

UNITED STATES OF AMERICA,
*Indian Territory, Western Judicial District:*

Peggie Woodward, on oath states that she is the defendant in the within styled suit; that the foregoing answer has been read
25 to her; that the statements made therein are true to the best of her knowledge and belief.

her
PEGGIE x WOODWARD.
mark.

Witness to mark
ARCHIE JONES.

Subscribed and sworn to before me this 18 day of Oct. 1906.
[NOTARY SEAL.]

JOHN W. SHARPE.

Cob. expires Oct. 20", 1909.

Said answer of defendant being endorsed on back as follows: No. 6939—Equity. Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, William Saunders, Plaintiffs, vs. Peggie Woodward, Defendant. Answer of Defendant. West. Dis. Ind. Ter. Filed in Open Court Oct. 18, 1906. R. P. Harrison, Clerk U. S. Courts. Jones and Meriwether, for Def't.

And thereafter, to-wit: On the 8th day of July, 1907, comes the Master in Chancery, Clark J. Tisdel, and files in the office of the Clerk of the United States for the Western District of Indian Territory, at Muskogee, Indian Territory, his report herein, together with the objections of the defendant heretofore filed in his office. The said report and objections are in words and figures as follows, to-wit:

26 In the United States Court for the Indian Territory, Western District, at Muskogee.

No. 6939. Equity.

PATSEY PERRYMAN, CLORY GROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs,

vs.

PEGGY WOODWARD, Defendant.

*Report of Master in Chancery.*

To the Honorable William R. Lawrence, Judge of said Court:

The undersigned, Clark J. Tisdel, Master in Chancery for this Court, to whom was referred the above entitled case by order of Court duly made and entered of record to take the proof and report his findings of fact and conclusions of law, begs leave to make the following report:

I.

On September 19, 1906, the plaintiffs herein filed their complaint, alleging in substance that they are the children of Squire Saunders, deceased, who died intestate at Muskogee on the 22nd. day of October, 1900; that he left him surviving as his sole heirs at law his said children, the plaintiffs herein; that at the time of his death, the said Squire Saunders was the owner in fee of Lot 10, in Block 248 in the City of Muskogee; that each of the plaintiffs is the owner of an undivided one-sixth interest therein; that the dfendant is in possession of said lot, claiming some right or interest therein; that she has collected rents from said premises in the sum of $300; that she is holding possession thereof unlawfully and against the will of the plaintiffs. Wherefore your plaintiffs pray that the said premises be partitioned among said plaintiffs and that the defendant be ruled and decreed to bring into Court the rents and profits collected
27 by her from said premises during the term of her possession.

II.

On October 18, 1906, the defendant filed herein her answer in which she admits that the plaintiffs are the heirs at law of Squire Saunders; denies that said Squire Saunders was the owner in fee of said premises or at the time of his death had any interest therein; avers that she is the original owner of said lot and that the plaintiffs have no legal or equitable interest therein.

III.

On December 3rd, 1906, this cause came on to be heard at my office in this District, the plaintiffs appearing by Messrs. Thomas & Foreman, their attorneys and the defendant appearing in person and by Messrs. Jones & Merriwether, her attorneys, whereupon the following witnesses were produced, duly sworn and examined and their testimony, which was taken in shorthand and reduced to writing, is attached hereto and returned herewith as a part of this report:

On the part of the plaintiff:
Patsy Perryman,
Isaac Saunders,
Andrew Caston.
On the part of the defendant:
Peggy Woodward.

IV.

*Findings of Fact.*

From the testimony of said witnesses, the documentary evidence introduced, and the pleadings filed herein, I find the facts in this case to be as follows:

1. That the plaintiffs herein are the children of Squire Saunders, deceased, who died intestate on the 22nd day of October, 1900.

2. That the said Squire Saunders left him surviving as his children, Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, and William Saunders, and Sarah Saunders
28 his wife.

3. That the said Squire Saunders at the time of his death was the owner of Lot 10 in Block 248 in the town of Muskogee Creek Nation, Indian Territory.

4. That the defendant purchased from Sarah Saunders, the widow of said Squire Saunders, deceased, the premises hereinabove described.

5. That the said widow's interest in and to said premises was purely that of dower.

I am, therefore of the opinion and conclude that the title to the premises known as Lot 10 in Block 248 is in the plaintiffs and that they each have an undivided one-sixth interest therein, subject to the dower of said Sarah Saunders, wife of said Squire Saunders, deceased.

I respectfully ask the Court to allow me the sum of Sixteen Dollars for my services herein rendered, which includes a stenographic fee of six dollars, being for sixty folios of transcript at the rate of ten cents per folio.

Respectfully submitted,

CLARK J. TISDEL,
*Master in Chancery.*

29 In the United States Court for the Indian Territory, Western District, at Muskogee.

Equity. No. 6939.

PATSEY PERRYMAN et al., Plaintiffs,
vs.
PATSY WOODWARD, Defendant.

Be it Remembered, that on this third day of December, 1906, the above entitled matter came on for hearing before Clark J. Tisdel, Master in Chancery for the Western District of the Indian Territory, at Muskogee, the plaintiffs, appearing in person and by Messrs. Thomas & Foreman, their attorneys, and the defendant appearing in person and by Messrs. Jones & Merriweather, her attorney, whereupon, the following evidence was introduced:

PATSEY PERRYMAN, one of the plaintiffs being first duly sworn, testified as follows:

Direct examination by Mr. THOMAS:

Q. State your name?
A. Patsey Perryman.
Q. How old are you?
A. I don't know exactly my age to tell you the truth.
Q. About forty?
A. Yes sir, every bit of it.
Q. Where do you live?
A. East of Muskogee.
Q. Five miles?
A. Yes sir.
Q. What was your father's name?
A. Squire Sanders.
Q. What was your mother's name?
A. Judy Taylor.
Q. Judy Sanders when she married?
A. Yes sir.
Q. Is your father living or dead?
A. No sir, he is dead.
Q. Do you know when he died?
30 A. Well, I don't know exactly what month he died in.
Q. It is stated in the bill here that he died on the 22 day of October 1900?

A. Yes sir, I believe that is the day.
Q. Did he leave a will?
A. Yes sir.
Q. Where is that will?
A. I guess it is in the Agent's office.
Q. It is stated in the petition that he never left a will?
A. No sir.
Q. You were talking about a deed?
A. Yes sir.
Q. Was your mother living at the time of your father's death?
A. Yes sir.
Q. Is she living now?
A. Yes sir.
Q. Where does she live?
A. Down below the stand pipe.
Q. Here in Muskogee?
A. Yes sir.
Q. Your own mother?
A. Own mother, yes sir.
Q. Will you give the names of the children, your father's children?
A. Yes sir.
Q. Living at the time of his death?
A. Patsey, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, and William Saunders.
Q. They were the daughters and sons left at the time of your father's death?
A. Yes sir.
Q. Do you know Lot 10 in Block 248 in Muskogee?
A. Yes sir.
Q. Who lived there at the time your father died?
A. His wife, Sarah Woodward.
Q. She lived there after the death of your father?
31 A. Yes sir.
Q. Was that your mother?
A. No sir, that's my step mother.
Q. Patsey, did you, as one of the heirs of Squire Sanders, deceased. did the Chief of the Creek Nation deliver anything to you?
A. No sir—oh, yes sir, he delivered a deed.
Q. Is this the deed?
A. Yes sir.

Plaintiffs introduce in evidence the deed, and ask that it be marked Exhibit "A" for plaintiffs.

Deed admitted and so marked.

Let the record show that by agreement a certified copy of this deed attached to the complaint as Exhibit "A" will be considered in evidence in place of the original deed, which is withdrawn by the plaintiffs.

Cross-examination by Mr. JONES:

Q. Where do you live?
A. In Muskogee.
Q. To what Nation do you belong?
A. Cherokee.
Q. To what Nation did Squire Sanders belong?
A. Cherokee.
Q. You stated in your examination that Squire Sanders died about the 20th or 22nd day of October, 1900?
A. Yes sir.
Q. Now, at the time of Squire Sanders' death you didn't have any deeds to any property of his?
A. No sir, not to his.
Q. Who did you say was living on this property at the time of the death of Squire Saunders, who was living on it?
A. Why, his wife.
Q. What was her name?
A. Squire Saunders' wife, why, Sarah Woodward, or Sarah Saunders.
Q. Who was your mother?
A. Judy Taylor.
32 Q. Was Judy Taylor the lawful wife of Squire Saunders?
A. I don't know that.
Q. You don't know whether she was or not?
A. I know she was my mother and he was my father but whether they were married I don't know.
Q. Did you ever have any knowledge of your father and mother living together as husband and wife?
A. Yes sir.
Q. In what community did they live?
A. They lived all right.
Q. I asked you in what community they so lived, what town?
A. In Tahlequah.
Q. For how long?
A. I can't tell you how long.
Q. About how long?
A. I just can't tell you exactly how long they lived there, but for several years.
Q. Is your mother living?
A. Yes sir.
Q. Have you any knowledge of a divorce ever having been procured by your mother?
A. No sir.
Q. As a matter of fact don't you know that your mother and Squire Saunders were never married?
A. I don't.
A. And don't you know that you and all your brothers and sisters are illegitimate children?
A. All the rest of the children?
Q. As a matter of fact don't you know that you and all your

brothers and sisters, descendants of Squire Saunders, are illegitimate children?

A. I don't know that.

Q. Is that the truth or is it not?

A. I don't know.

Q. You state in your petition that at the time of his death
33 Squire Saunders was the owner in fee simple of Lot 10 in Block 248?

A. Yes sir.

Q. Don't you know that at the time of his death Squire Sanders had not paid one dollar on that property?

A. No sir, I don't know that.

Q. Don't you know that on October—in October, 1900, not one cent had been paid as an appraisement on this property?

A. How do you know that?

Q. Answer my question.

Mr. THOMAS: We object.

The MASTER: Objection sustained.

Defendant excepts.

Redirect examination by Mr. THOMAS:

Q. Did your father acknowledge you and own you as his children?

A. Yes sir, he did and when — was taken sick I was the first child he sent for and I was with him night and day.

Q. Were your father and mother living together at the time of during your childhood?

A. Yes sir, until the time of the War, that's what parted them.

Q. All these children had been born before that?

A. Yes sir.

Q. And your father and mother lived together as man and wife all that time?

A. Yes sir.

Q. Patsey, Clory Gross, Isaac, Fred, Sam and William Saunders were all the sons and daughters of Squire Saunders?

A. Yes sir.

Q. Do you know whether or not he had acknowledged them as his children?

A. Yes sir he called all their names and wanted them there when he was sick and my husband tried to get them there.

Q. Your father and mother, if married, were married before you remember?

A. Yes sir, before I come here.

34 Q. How old were you when they separated?

A. I was in my third year, going on four.

Q. Are you the youngest child?

A. I am the oldest child living.

Q. These other children were born after you?

A. Yes sir.

Q. You say you were only three or four years old when they separated?

A. I don't know my age.
Q. You say you were three or four years old when they separated and *hear* are five children born after that?
A. No sir, I don't know my age, I might have been older. I don't want to tell no story, I want to be honest.
Q. Are Clory Gross, William, Fred, Isaac and Sam Saunders all your full brothers and sisters?
A. Yes sir, they are.
Q. All have the same father and the same mother?
A. Yes sir.

Witness excused.

ISAAC SAUNDERS, a witness produced, sworn and examined on behalf — plaintiffs were examined by Mr. Thomas and testified as follows:

Direct examination by Mr. THOMAS:

Q. What is your name?
A. Isaac Saunders.
Q. What is your age?
A. About 32 years of age.
Q. Where do you live?
A. North—south—right south of here about three and ½ miles.
Q. South of Muskogee?
A. Yes sir.
Q. Who was your father?
A. Squire Saunders.
Q. Who was your mother?
A. Katie Saunders.
Q. Is your mother the same as Patsy's?
A. No sir.
Q. Your name is Isaac Saunders?
A. Yes sir.
Q. Were you present at the time of your father's death?
A. Yes sir.
Q. Do you know whether your father and mother were married or not?
A. I couldn't say.
Q. Do you know whether they were, or whether they were not—you say you could not say; answer my question.
A. They were living together.
Q. How long did they live together?
A. Lived together, I guess, about——
Q. Are you the only child by that mother and this man?
A. No sir.
Q. Give me your best idea as to how long they lived together?
A. About 35 years.
Q. Your mother and father lived together as man and wife, did they?
A. Yes sir, my oldest brother is about 35 years old.

Q. What is his name?
A. Fred.
Q. Is he here?
A. No sir.
Q. Is Sam Saunders here?
A. No sir.
Q. Is William Saunders here?
A. No sir.
Q. Is Clory Gross here?
A. No sir.
Q. Were you present at the time of your father's death?
A. Yes sir.
Q. When did it occur?
A. His death?
Q. Yes sir?
36 A. 22nd of October, 1900.
Q. Where?
A. Down on the south—north part of them.
Q. Which do you say? You say south and north.
A. The north is what I mean.
Q. Do you know the lot that is in controversy in this case?
A. Yes sir.
Q. Who was living on it at the time of your father's death?
A. He was.
Q. Is your father still living?
A. No sir.
Q. Is he the same—was your father the same Squire Saunders to whom this deed to lot 10 in block 248 in Muskogee was delivered to Patsy Perryman as one of the heirs?
A. Yes sir.
Q. That is the same property? That is the same property?
A. Yes sir.
Q. Do you know who he bought the property from?
A. Yes sir.
Q. That is, he bought the possessory right, bought it before the town was laid off by the Townsite Commission?
A. Yes sir.
Q. Was he or was he not in possession at the time the plat was made by the Muskogee Townsite Commission and the engineer?
A. I don't know sir, I wasn't living here at the time.
Q. About how long had your father lived there at that place before his death?
A. He lived there about a year.
Q. Do you know whether or not he claimed to be the owner of the improvements on the lot at the time of his death?
A. Yes sir.
Q. Did he claim to be the owner of them at the time of his death?
A. Yes sir.
Q. And died there in the house on that lot?
A. Yes sir.
37 Q. Are you one of his children?
A. Yes, sir.

Q. Can you state to the Court whether or not he ever owned you as one of his sons — called you one of his sons?
A. Yes sir he did.

By Mr. MERRIWEATHER:

Q. About how old did you say you were, Mr. Saunders?
A. About 32.
Q. Who did you say your mother was?
A. Katie Saunders.
Q. You said your mother and your father lived together 35 years?
A. Yes sir, about 35 years.
Q. Where did they live?
A. They lived up at Tahlequah and Braggs—Braggs is where my mother died—and on the Illinois River.
Q. Do you know Patsy Perryman?
A. Yes sir.
Q. Clory Gross?
A. Yes sir.
Q. Isaac Saunders?
A. Yes sir.
Q. Fred Saunders?
A. Yes, sir.
Q. Sam Saunders?
A. Yes, sir.
Q. William Saunders?
A. Yes sir.
Q. What relation are you to the ones named here?
A. A full brother, except Patsy.

By the MASTER:

Q. Do you mean by that that you and the rest of these children, except Patsy, had the same father and the same mother?
A. Yes, sir.
Q. Was Patsy Perryman's mother and your father living together and was Patsy born before you boys were born?
38 A. Yes sir.
Q. Who is the oldest living child of your father?
A. Patsy Perryman.

By Mr. MERRIWEATHER:

Q. Now, where is your mother now, Mr. Saunders?
A. She is dead.
Q. Do you know when she died?
A. Yes sir.
Q. I will ask you at what time? Just the year.
A. Died in '87.
Q. She died in '87. Did you know Sarah Saunders?
A. Slightly acquainted with her, yes sir.
Q. Do you know what relation Sarah Saunders bore to Squire Saunders in 1900?

A. She was his wife, I suppose.

Q. Now Mr. Saunders, you testified that this deed was delivered in substance to the heirs of Squire Saunders, didn't you? The judge asked you that question and you said "yes sir."

A. Yes sir, to Patsy Perryman for the heirs.

Q. Do you know it?

A. Do I know it to be positive?

Q. Do you know that this deed was delivered to Patsy Perryman as one of the heirs of Squire Saunders, or were you told that?

A. Yes sir.

Q. You know it was?

A. Yes sir.

Q. Do you know about when?

A. No sir, I could not say the day at all.

Q. Do you know if Squire Saunders and Sarah Saunders were married?

A. No sir.

Q. You don't know that? You do know that at the time of the death of Squire Saunders, Sarah Saunders and Squire Saunders had been living together as man and wife, don't you?

A. Yes sir.

Witness excused.

39 ANDREW CASTON, being first duly sworn on behalf of the plaintiffs testified as follows:

Direct examination by Mr. THOMAS:

Q. What is your name?

A. Andrew Caston.

Q. Where do you live?

A. On North Third Street, No. 635.

Q. What is your age?

A. Going on 54.

Q. What is your business?

A. I am a carpenter and millwright.

Q. Are you acquainted with Patsy Perryman and the balance of the parties plaintiffs and defendant in this case: Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, Plaintiffs, and Peggie Woodward, Defendant?

A. Yes sir.

Q. Are you acquainted with the property in controversy in this case, Lot 10, in Block 248, in the city of Muskogee?

A. It lays by the side of mine. My place is on the north of it.

Q. You are acquainted with it then?

A. Yes sir.

Q. Were you acquainted with Squire Saunders in his life time?

A. Yes sir.

Q. How long had you known him before his death?

A. Four or five years.

Q. Do you know when he died?

A. Yes sir.

Q. When was it?
A. I don't recollect the day, I wasn't here, I was four or five miles away.
Q. Were you at his funeral?
A. No sir.
Q. Do you know whether Squire Saunders was living on the land in question here at the time of his death?
A. Yes sir.
Q. Can you name the children of Squire Saunders'—the living children?
A. I know them all, but I couldn't call them by name.
Q. Do you know Patsy Perryman?
A. Yes sir.
Q. Do you know whose daughter she is or who claimed her as his daughter?
A. Squire Saunders.
Q. What improvements were there on the property at the time of Squire Saunders' death?
A. They was a two room house and a stable on it.
Q. Do you know what became of the stable?
A. I think Miss Woodward moved it away.
Q. Is Miss Woodward the defendant?
A. Yes sir.
Q. She moved it off the property?
A. Yes sir.
Q. Do you know where she moved it?
A. No sir.
Q. What was the improvements worth at the time it was moved off?
A. O, it was worth about $25.00.
Q. $25.00. Can you tell what the reasonable rental value of the property has been per month since Squire Saunders' death?

By Mr. MERRIWEATHER: Judge, I would like to interpose an objection because you haven't qualified your witness.

By Mr. THOMAS:

Q. Do you know what the reasonable rental value of the property has been since——
A. About $5.00 per month.
Q. You know what it is reasonably worth?
A. Yes sir.
Q. You have known other property to be rented in that neighborhood?
A. Yes, sir, I have rented the adjoining.
Q. About $5.00 per month?
A. Yes sir, $5.00 per month.
Q. Do you know anything else in connection with this matter, Mr. Caston, that you think can throw some light on this matter?
A. I don't think of it at present.

41 Cross-examination by Mr. MERRIWEATHER:

Q. Mr. Caston, did you know Squire Saunders prior to his death?
A. Yes sir.
Q. How long had you known him prior to the date of his death?
A. Four or five years.
Q. You say that Patsy Perryman is the daughter of Squire Saunders?
A. He told me so.
Q. Where and under what circumstances did he tell you that Patsy Perryman was his daughter?
A. He would often go out there and he would say he was going out to his daughter Patsy's. He and I used to go out there.
Q. Where was she living then?
A. On the river.
Q. Who was present except you and Mr. Saunders when he would make these remarks?
A. I don't remember any one.
Q. Did you ever hear him say anything about the other children?
A. Yes sir.
Q. Well, can you state any particular circumstances that he would mention these children being his?
A. We lived on adjoining lots; he would speak of the different children and about going to see his children.
Q. Did you ever ask him directly whether such and such a Saunders was his child?
A. No sir.
Q. He never stated more to you than they *they* were his children?
A. No sir, they would come to see him, he said he was going to send for Patsy when he was sick.
Q. You knew Sarah Saunders, didn't you?
A. Yes sir.
Q. Did you know what relation, if any, she bore to Squire Saunders at the time of his death?
42 A. What relation?
Q. Yes sir, if any?
A. She was his wife.
Q. Mr. Caston, do you know whether or not there were any more improvements on the lot, lot 10 in block — the lot in question, do you know what other improvements there were on the lot except that barn?
A. Nothing but a water closet and house, that is, where he was living.
Q. Have you a fair knowledge as to values of lots and houses, etc. in the town of Muskogee and in that particular locality—did you have at that time?
A. Yes sir.
Q. Now, you may state to the Court what kind of a barn this was?
A. It contained two departments—kept his horse in one and his gears and feed in the other.
Q. How wide was this barn?

A. It was about 14 feet wide.
Q. About how long?
A. About 20 feet.
Q. About how high?
A. It was about 9 feet on one side and 7 feet on the other.
Q. Built with what we call a flat roof?
A. Yes sir.
Q. I will ask you to state, Mr. Caston, how long the barn had been built before it was moved, so far as you know?
A. It was—there was a barn on it there when he bought—he built some more to it.
Q. Well, when did he buy it?
A. He bought it, as well as I recollect, it was about 8 years ago—8 or 9 years ago.
Q. About how many years before his death, if you can remember?
A. Four or five years.
Q. It would be about 8 or 9 years ago, wouldn't it?
43 A. I don't recollect.
Q. There was some of the barn there when he bought?
A. Yes sir.
Q. How much of it there?
A. More than half of it.
Q. What kind of material was the barn built out of.
A. One by twelve.
Q. Pine or oak?
A. Pine.
Q. What, in your judgment, was the value of the house on that lot?
A. The house was worth about $100.00—the house, the building and the material.
Q. What kind of a roof was there on that barn?
A. Board roof, one by twelve, joints stripped.
Q. You had been in that barn?
A. Yes sir.
Q. Was it floored?
A. No sir.
Q. Now, do you mean to say to the Court as wide and as long and as high as you have just stated, more than half of which had been on the property before the date of his death, which was in 1900, with the addition he had made up to the time of his death, was worth $25.00 at the time of his death?
A. Yes sir.

Witness excused.

Judge THOMAS, being duly sworn, witness on behalf — plaintiff-, testified as follows:

My name is John R. Thomas, I reside in Muskogee, I am a lawyer by profession and have an office in the Turner Building. I am acquainted with the parties to this suit, I was present with Patsy Perryman and the witness Isaac Saunders in the latter part of

August or early part of September in the year 1906, when John Adams, the Chief Clerk to the Principal Chief of the Creek Nation delivered to Patsy Perryman, in behalf of the Chief, the
44 deed which has been introduced in evidence as plaintiffs' exhibit "A" and stated at the time it was delivered to her——

By the MASTER:

Q. Who did?

A. John Adams, the Chief Clerk—that it was delivered to her as one of the children and heirs of her father, Squire Saunders. The deed was received by Patsy Perryman and handed to me as her attorney, and I have had it in my possession from that time until the present, and have it now.

Witness excused.

By Mr. THOMAS That is the case for the plaintiffs.

PEGGIE WOODWARD, being first duly sworn on her own behalf testifies as follows:

Direct examination by Mr. JONES:

Q. What is your name?

A. Peggie Woodward.

Q. What is your post-office address?

A. Muskogee.

Q. About how old are you.

A. Fifty-nine.

Q. You are the defendant in this case, are you not?

A. Yes sir.

Q. State, Mrs. Woodward, whether or not you are acquainted with this lot in controversy?

A. I am. I bought it of my daughter Sarah.

By Mr. THOMAS: I object to that.

By Mr. JONES: Mrs. Woodward, who is in possession of that lot at present?

A. Sarah.

Q. At the present?

A. I am.

Q. You may state to the Court how you come to be in possession of that lot?

A. Why, my daughter took it before the Probate Court—
45 some expenses were to be paid.

Q. Mrs. Woodward, who put you in possession of that property?

A. Sarah Saunders, I bought it from her.

Q. Now, who is Sarah Saunders?

A. My daughter.

Q. What relation did Sarah Saunders bear to Squire Saunders?

A. His lawful wife.

Q. Was she his lawful wife at the time of his death?
A. Yes sir. Yes sir.
Q. Under what circumstance, Mrs. Woodward, did Sarah Saunders put you in possession of that property?
A. Because the funeral expenses was to be paid and she had no money to pay them.
Q. For whom.
A. Old man Saunders.
Q. Do you know how much these funeral expenses were, Mrs. Woodward?

By Mr. THOMAS: I object.

By the MASTER: Needn't go into that.

Q. Did you pay the expenses of Squire Saunders' funeral?
A. Yes sir.
Q. To whom?
A. Undertaker Moore.
Q. Did you, or did you not receive a receipt for the payment?
A. Yes sir.
Q. You may examine this paper?
A. I can't read, but this is it.

By Mr. THOMAS: I object to all this testimony.

By Mr. JONES: We are not claiming a title under a deed, they have testified as to the value of these improvements, and at the time of Squire Saunders' death he owned the property—there could be no title to any at that time. Now, then, it is a question as to who owned these improvements at the time the appraisements were about to be paid. This is to show how she came by the improvements and who paid the appraisement.

By Mr. THOMAS: This is wholly incompetent. The ques-
46 tion is, how she owns the property and where is her deed. I move to strike it out as being wholly incompetent.

Q. Did you, Mrs. Woodward, receive a receipt at the time you paid these expenses?
A. Sure did.
Q. You may look at this paper?
A. That is the receipt for it.

By Mr. JONES: We desire to offer in evidence marked defendant's exhibit "A" this receipt.

By Mr. THOMAS: We object to this for the reason that it does not appear to have been paid by this woman, the defendant in this case; is not a bill made out against her, and is wholly incompetent to prove or disprove any one of the issues in this case.

By the MASTER: She says she paid the bill, we will let it go in and pass on it later.

By Mr. JONES:

Q. Mrs. Woodward, did you take possession of the improvements of the property in question?

A. Yes sir, she moved out and gave me possession.
Q. About when?
A. Month or two after the old man died.
Q. A month or two after he died?
A. Yes sir, she moved out and gave me possession.
Q. Mrs. Woodward, do you know in whose name that property was scheduled?
A. In the old man's name.
Q. What, if anything, did you do with the property after you entered into possession of it.
A. I rented it whenever I could.
Q. Did you do anything in the way of keeping up the taxes?
A. Yes sir, I paid all the taxes.
Q. Did you do anything in the way of paying the appraisements?
A. I have paid all of it.

By Mr. THOMAS: I object.
By the MASTER: That may stand.
47 By Mr. THOMAS: I save an exception.

Q. Mrs. Woodward, did or did you not receive from the Indian Agent receipts for the moneys you paid as appraisements on that property?
A. Yes sir, I received it.
Q. You may look at this paper and see if they are the receipts made to you?
A. Yes sir.

By Mr. JONES: We offer first a receipt from J. Blair Shoenfelt, United States Indian Agent, issued on October 11th, 1901, being a receipt for $3.75 cash, the same being 10 per cent payment on lot 10, block 248, marked defendant's exhibit "B." Exhibit "C" is a receipt from J. Blair Shoenfelt, United States Indian Agent, dated February 20th, 1902, part payment on the land in question, being 15 per cent. Exhibit "D" being a receipt under date of January 28th, 1903, for another part payment of the lot in question of 25 per cent. Exhibit "E" is a receipt for the final payment on the said property, signed by J. Blair Shoenfelt, United States Indian Agent, and dated December 2nd, 1903.

Q. Mrs. Woodward, about how many years have you been in possession of that property?
A. I can't tell the day of the month.
Q. How many years?
A. Between 5 and 6, I don't know.
Q. Who, if anyone, has kept up the taxes on that property?
A. I did it.
Q. Did you receive receipts as payment for these taxes?
A. Yes sir.
Q. You may look at these papers.
A. I paid these last year; those are my tax papers.

By the MASTER: Do you want to offer them.
By Mr. JONES: Yes sir.

By the MASTER: Council for defendant offers in evidence the tax receipts from the City of Muskogee on the property in question under date of January 31st, 1903, for $3.45, marked defendant's exhibit "F," and a like receipt under date of February 21st, 1906, for taxes on the same lot in the sum of $10.18, marked defendant's exhibit "G."

48

By Mr. THOMAS: To the introduction of which the plaintiffs object.

By the MASTER: That may go in.

By Mr. THOMAS: I would like to have the objection retained.

Q. Were you acquainted with Juda Taylor, the mother of Patsy Perryman?

A. I have seen her but I am not much acquainted with her.

Q. About how long have you known her?

A. I don't know.

Q. Did you know her relationship with Squire Saunders?

A. No sir, I don't know anything about her.

Q. Did you know Katie Saunders, the mother of these other plaintiffs?

A. No sir, when I got acquainted with them they claimed their mother was dead. I never got acquainted with old man Saunders until he married my daughter.

Cross-examination by Mr. THOMAS:

Q. Peggie, you say you have this property and you rented it and collected the rent?

A. Yes sir.

Q. Used the money?

A. Yes sir.

Q. You took the stable off the lot?

A. Yes sir.

Q. You moved it off and applied it to some other purpose?

A. No sir, Alex. Saunders burned part of it.

Q. You moved it away?

A. Yes sir, to keep the people from burning it up. It didn't amount to anything.

Q. How much rent did you get for this property?

A. $4.00 a month.

49

Q. When?

A. Whenever I could rent it.

Q. How much rent have you got out of it?

A. I don't know.

Q. About how much?

A. I don't know. I am not going to tell you no story, because I don't know.

Q. How much this year?

A. Not a cent. The wind blew the roof off.

Q. You have not rented it this year?

A. No sir.

Q. Did you rent it last year?

A. A woman lived in it awhile but didn't pay no rent.

Q. How much did you get the year before?
A. Just as I told you, sometimes it was rented and sometimes it wasn't.
Q. But you say you only rented it for $4.00 a month?
A. Yes sir.
Q. Is that as much as you got out of it?
A. Yes sir, and I can prove it.
Q. You are proving it now.
A. No sir, I ain't got *not* witnesses.

Redirect examination by Mr. JONES:

Q. You said on your direct examination that you paid these appraisements?
A. Yes sir.
Q. When you did go to pay these appraisements who went with you?
A. Richard Woodward, and sometimes Rose, and sometimes Anna went with me.

Witness excused.

By the MASTER: Case closed, with the exception of a certified copy of order in probate case of the estate of Squire Saunders, which it is agreed by Judge Thomas shall be introduced subject to his objection when he has seen it, and that made, closes the case.

Mr. THOMAS: Plaintiff- objects to the introduction and consideration of the certified copy of the order of the Probate Court in
50 the matter of the estate of Squire Saunders, deceased, for the reason that said order related exclusively to the personal estate of Squire Saunders and not to real estate and therefore is incompetent and inadmissible in this action for the partition of real estate.

The Court order referred to above being in words and
51 figures as follows, to-wit:

In the United States — for the Northern District of the Indian Territory, Sitting at Muskogee.

Probate. No. 454.

In re Administration of the Estate of SQUIRE SANDERS, Deceased. SARAH SAUNDERS, Widow.

*Order of Court.*

Now on this 16th day of November A. D. 1900, the same being one of the regular judicial days of the Sept. Term, the above styled cause came on for hearing upon the report of Z. T. Walrond, Probate Commissioner, and the Court being advised in the premises finds that said report should be sustained.

Whereupon, it is considered, ordered and adjudged by the Court that it appearing that the estate of said deceased does not exceed

three hundred dollars, the said estate do vest absolutely in Sarah Sanders, the widow of said Squire Sanders, deceased.

It is further ordered that the improvements on Lot 10 of Block 248 of the townsite in Muskogee, and the horse, saddle and bridle, and the other personal property described in the petition of the said widow are declared to be the property of the said widow, and that there be no administration granted upon the estate of the said decedent. The costs of this proceeding, including an allowance of $5 made to the Probate Commissioner are taxed against the said Sarah Sanders.

Approved.

[SEAL.] JOHN R. THOMAS, *Judge.*

I, Chas. A. Davidson, clerk of the United States Court for the Northern District, Indian Territory, do hereby certify that the above and foregoing is a true and correct copy of an order of Court made on the 16th day of November A. D. 1900 in Probate No. 454.

Witness my hand and the seal of said Court this 8th day of December, A. D. 1900.

CHAS. A. DAVIDSON, *Clerk,*
By P. M. FORD, *Deputy.*

Endorsed as follows, to-wit: No. 454. Estate of Squire Sanders, Dec'd. Order of Court.

52 The MASTER: Objection sustained.
Exception by Defendant.

Case closed.

The foregoing testimony, together with the exhibits hereto attached, was all the evidence offered in this case.

CLARK J. TISDEL,
*Master in Chancery.*

"EXHIBIT A."

MUSKOGEE, IND. TER., Mar. 6th, 1900.

Largest and Most Complete Stock of Wood, Cloth and Metallic Caskets and Undertakers' Supplies in the Indian Territory.

Mrs. Sarah Sanders, for the Burial Expenses of Squire Sanders, Dec., to C. W. Moore, Undertaker and Embalmer, Dr.

Nov. 1900:

| | |
|---|---|
| To one casket | 65.00 |
| " " robe | 10.00 |
| | 75.00 |

Received from Mrs. Peggy Woodworth the sum of seventy five dollars in full payment of the above, Mrs. Sanders having died.

_____, _____.

EXHIBIT "B."

Department of the Interior,
United States Indian Service.

Office of United States Indian Agent,
Union Agency.

MUSKOGEE, INDIAN TERRITORY, October 11, 1901.

Squire Sanders, care Peggy Woodward, Muskogee, I. T.

SIR: I acknowledge receipt from you of cash for $3.75,
53 the same being the 10% payment on

| | |
|---|---|
| lot 10 | block 248 |
| lot — | block — |
| lot — | block — |
| lot — | block — |

Muskogee, Indian Territory, as per statements accompanying remittance.

Very respectfully,

J. BLAIR SHOENFELT,
*U. S. Indian Agent.*

J. F. W. (M. S.)

EXHIBITS "C."

Department of the Interior,
United States Indian Service.

Offie of United States Indian Agent,
Union Agency.

MUSKOGEE, INDIAN TERRITORY, February 20, 1902.

—— Saunders, c/o Peggie Woodward, City.

SIR: I acknowledge receipt of your remittance of $5.63, the same being the 15% payment on

| | |
|---|---|
| lot 10 | block 248 |
| lot — | block — |
| lot — | block — |
| lot — | block — |

in the town of Muskogee, Indian Territory, as per statements accompanying remittance.

Very respectfully,

J. BLAIR SHOENFELT,
*U. S. Indian Agent.*

W. F. W. (W. A. C.)

54 EXHIBIT "D."

*Receipt Account of Town-lot Payments.*

All remittances should be made to U. S. Indian Agent accompanied by statements in duplicate.
Refer in reply to No. 965 C.
H. E. C.

Department of the Interior,
United States Indian Service.

Office of United States Indian Agent,
Union Agency,

MUSKOGEE, INDIAN TERRITORY, January 28, 1903.

Squire Saunders, c/o Peggy Woodward, Muskogee, I. T.:

I acknowledge receipt of your remittance of $9.77 Int. 40% the same being the 25% payment on

| | |
|---|---|
| lot 10 | block 248 |
| lot — | block — |
| lot — | block — |
| lot — | block — |

in the town of Muskogee, Indian Territory, as per statement accompanying remittance.

Very respectfully,

J. BLAIR SHOENFELT,
*U. S. Indian Agent.*

J. F. W. (W. A. C.). Muskogee.

EXHIBIT "E."

Received from Squire Saunders, Muskogee, Eighteen and $18.75 75/100 on account of payment for lots of Muskogee Ind. Ter., as follows:

| Lot. | Block. | Sold for. | Paid. |
|---|---|---|---|
| 10 | 248 | $37.50 | $18.75 |

Final Payment —.

Total ..... $18.75

J. BLAIR SHOENFELT,
*U. S. Indian Agent.*

(This exhibit had been both burned and torn, and was very hard to copy.)

(Temporary Receipt Illegible.)

(Illegible) —— ——, *Clerk.*

55 EXHIBIT "E."

City of Muskogee.—Tax Receipt.

No. 420.

MUSKOGEE, IND. TER., Jan. 31st, 1903.

Value of Personal Property as per Tax Books..... $——
General Fund ..... $——
School Fund ..... $——

Value of Real Property as per Tax Books:

| | | | |
|---|---|---|---|
| Lot 10 | Block 248..... | $288 | |
| Lot — | Block — ..... | $—— | |
| Lot — | Block — ..... | $—— | |
| General Fund ..... | | | 2.30 |
| School Fund ..... | | | 1.15 |
| Total ..... | | | $3.45 |

Received payment of Peggy Woodward $3.45 Three 45/100 Dollars taxes upon the property herein mentioned as charged upon the Tax Books.

WM. HERRING,
*Marshall and ex-Officio Col-ector,*
By —— MARTIN,
*Deputy.*

EXHIBIT "G."

The City of Muskogee, Indian Territory.

No. 2641.

Page No. —.
Year 1905.
Value of Real Property and Assessment as per Tax Books:

| Block. | Lot number. | Lot subdivided. | Valuation. | City Tax. General. Mills. | School. Mills. | Mills. | Total. |
|---|---|---|---|---|---|---|---|
| 248 | 10 | ..... | 638 | .... | ..... | .... | $10.18 |

Value of Personal Property as per Tax Book:

Total ..... 10.18

Received of Peggy Woodward ($10.18) Ten & 18/100 Dollars taxes upon the property herein mentioned as charged upon the Tax Books.

C. E. HART, *Collector,*
By —— HOLLINGSWORTH,
*Deputy.*

56 Said Report of Master in Chancery endorsed on back as follows:

No. 6939, Equity. In the United States Court, Western District, Ind. Ter. Patsy Perryman, et al., Plaintiffs, vs. Peggy Woodward, Defendant. Report of Master in Chancery, Western Dist., Ind. Ter. Filed Jul- 8, 1907. R. P. Harrison, Clerk U. S. Courts. Clark J. Tisdel, Master in Chancery, Muskogee.

No. 6939. Equity.

PATSY PERRYMAN et als., Plaintiffs,
vs.
PEGGY WOODWARD, Defendants.

And now comes the defendant and files through her attorneys, Jones and Meriweather, her written objections and exceptions to the report of the Master in Chancery, under date of March 20th, 1907, and as the causes of said objections and exceptions says:

(1) That the legal conclusions of said Master in Chancery are unsupported by the evidence submitted in this case.

(2) That the legal conclusions of said Master in Chancery are unsupported by and wholly inconsistent with the law governing this case. That findings in fact numbered 3, 4, 5 are inconsistent with the testimony and wholly contrary to law.

(3) That said Master in Chancery committed gross error, wholly inconsistent with equity and justice and grossly prejudicial to defendant's rights when he refused to admit in evidence when properly offered, a certain document to-wit an order of Court made by the Judge of the U. S. Court for the Northern District of the Indian Territory, which order in substance showed that the personal estate of one Squire Saunders, (said estate claimed to be identical with the subject matter of this cause) had been vested in one Sarah Saunders.

Wherefore defendant excepts and objects to said report and asks that said exceptions and objections be sustained by this Court.

PEGGY WOODWARD,
By JONES & MERIWETHER,
*Her Attorneys.*

57 Said objections and exceptions being endorsed on back as follows:

No. 6939—Equity. Patsy Perryman et als. Plaintiffs vs. Peggie Woodward defendant. Objections & Exceptions to Master's Report by Defendant. June 19, 1907. Carefully considered and overruled. Clark J. Tisdel, Master. Filed — M. Mar. 23, 1907. Clark J. Tisdel. Western Dist. Ind. Ter. Filed Jul- 8, 1907. R. P. Harrison, Clerk U. S. Courts. Jones & Meriwether for Deft.

And thereafter, to-wit: On Friday the 2nd day of July, 1909, there is filed in the office of the Clerk of the District Court for the Third Judicial District, Muskogee County, Oklahoma, an order from

the Supreme Court of the State of Oklahoma. Said order being in words and figures as follows, to-wit:

In the Supreme Court of the State of Oklahoma.

The term of court heretofore set for Muskogee, in the County of Muskogee, in the Third District Court Judicial District of the State of Oklahoma, to begin on May 24th, 1909, and continue for a period of six weeks, is hereby extended for a further period, so as to extend to and include the 31st day of July, 1909.

Filed Jun- 30, 1909. W .H. L. Campbell, Clerk.

UNITED STATES OF AMERICA,
*State of Oklahoma, ss:*

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of the order of Court, as the same remains on file and of record of this office.

In Witness Whereof, I have hereunto set my — and affixed the seal of the said Supreme Court, at Guthrie this 30th day of June, 1909.

[SEAL.] W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

58 And thereafter, to-wit: On Friday the 16th day of July, 1909, the same being one of the days of the regular May 1909 term of the District Court for the Third Judicial District Court of Muskogee County, Oklahoma, Honorable John H. King, Judge, presiding, the issues in this case having been fully joined, this cause comes on for hearing upon the report of the Master in Chancery heretofore filed herein. Both parties are announced ready for trial and the court having heard the argument of counsel takes the matter under advisement.

And thereafter, to-wit: On Friday the 30th day of July 1909, the same being one of the days of the regular May 1909 term of the District Court for the Third Judicial District of Muskogee County, Oklahoma, the Honorable John H. King, Judge, presiding, the court having heretofore heard the argument of counsel herein, now being well and sufficiently advised in the premises doth render decree. Said decree being in words and figures as follows, to-wit:

In the District Court in and for Third Judicial District, Muskogee County, State of Oklahoma.

Hon. John H. King, Judge.

*Decree.*

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs,

vs.

PEGGY WOODWARD, Defendant.

*Findings of Facts.*

This cause coming on to be heard on the exceptions to the Master's report, this 30th day of July, 1909, a judicial day of the May term of said Court, and all parties being present in person and by attorney; and the Court having the evidence of the witnesses that were introduced before the Master, duly sworn and examined, and having heard argument of Counsel and *and* being fully advised in the premises finds the following state of facts:

59 (1.)

That the plaintiffs herein are the children of Squire Saunders, deceased, who died on the 22nd day of October, 1900.

(2.)

That the said Squire Saunders, at his death left surviving him as his children, Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, William Saunders, and Sarah Saunders, his wife.

(3.)

That the said Squire Saunders died intestate.

(4.)

That the said Squire Saunders, left no minor children at his death.

(5.)

That the said Squire Saunders, at the time of his death, *he* owned the possessory right, and occupied the following described property, to-wit: Lot 10, Block 248, in the town of Muskogee, Creek Nation, Indian Territory, being the property in controversy and that a deed to same was issued to him January 24th 1904.

(6.)

That on the 16th day of November, 1900, the United States Court for the Northern District, of the Indian Territory, Hon. John R.

Thomas, Judge, sitting at Muskogee in said District, in Probate in case styled "In re Administration of the Estate of Squire Saunders, deceased, Sarah Saunders, widow, and numbered 454," finding that the estate of the deceased Squire Saunders, was of less value than $300.00, entered a decree of said Court vesting the estate absolutely in Sarah Saunders, the widow of the deceased Squire Saunders.

(7.)

That the defendant Peggy Woodward, purchased from Sarah Saunders, the widow of the said Squire Saunders, deceased, in 1900, the following described property to-wit: Lot 10, Block 248, in the town of Muskogee, Creek Nation, Indian Territory, the property in controversy; that possession of said property was delivered
60 to the defendant Peggy Woodward.

(8.)

That the defendant Peggy Woodward, has been in the uninterrupted possession of the above described property, was in the possession at the time this suit was filed and is now, and has been since the year 1900, and has paid all appraisements and a part of the taxes.

(8.)

That there is no equity in the plaintiffs' petition.

It is therefore ordered, adjudged and decreed by the Court that plaintiffs take nothing by this suit and that the defendant Peggy Woodward, is the owner and in possession of the property in controversy herein, to-wit: Lot (10) Ten, in Block (248) Two Hundred-Forty-eight according to the original plat of the Town of Muskogee, formerly Indian Territory, and was the owner and in possession thereof at the time this suit was filed.

That the title of the defendant Peggy Woodward, is clear and free from any cloud or incumbrance and that defendant have and recover of and from the plaintiffs, all of her costs in and about this suit laid out and expended and that execution may issue therefor, to all of which the plaintiffs except.

JOHN H. KING,
*Judge of the District Court, Third Judicial District,*
*Muskogee County, State of Oklahoma.*

O. K.
N. A. GIBSON.

Whereupon, on the same day, to wit: The 30th day of July, 1909, come the plaintiffs and file a motion for new trial. Said motion being in words and figures as follows, to wit:

In the District Court of Muskogee County, Oklahoma.

No. 6939.

PATSEY PERRYMAN et al., Plaintiffs,
vs.
PEGGIE WOODWARD et al., Defendants.

*Motion for a New Trial*

Comes now the plaintiffs and move the Court to set aside the decree herein rendered and to grant them a new trial for the
61 following reasons:

(1) Because the said decree was contrary to the law.

(2) Because the said decree was contrary to the evidence.

(3) Because the Court erred in not confirming the report of the Master herein filed.

(4) Because the Court erred in holding that the land in controversy in this case was ever vested in the widow of Squire Saunders.

(5) Because the Court erred in finding that the land in controversy was ever the property of Peggie Woodward, the defendant.

(6) Because the evidence shows that the land is still the property of the heirs of Squire Sanders, and that the defendants procured a patent to be issued in the name of Squire Saunders conveying the said land to him from the Creek Nation, and there is no proof to sustain the contentions of the defendants that a trust was created thereby in favor of the defendants, or any of them.

BENJ. MARTIN, JR, &
GIBSON & THURMAN,
*Attorneys for Plaintiffs.*

Said Motion for a New Trial being endorsed on back as follows: No. 6939. Patsy Perryman, et al., Plaintiffs vs. Peggie Woodward, et al., Defendants. Motion for a New Trial. State of Oklahoma, County of Muskogee, filed Jul. 30, 1909, W. P. Miller District Clerk. Gibson & Thurman, Muskogee, Oklahoma. Attorneys for Plaintiffs.

Whereupon, on the same day, the 30th day of July, 1909, the following Journal Entry was entered of record, to wit:

6939.

PATSY PERRYMAN et al.
vs.
PEGGY WOODWARD et al.

Now, on this day come the parties by their attorneys, and the plaintiffs by their attorneys, file a motion for new trial of this

cause. And the Court having heard said motion, and being well and sufficiently advised in the premises, now overrules the same, to which ruling and decision of the Court the plaintiffs except.

62 And now the plaintiffs pray an appeal of this cause to the Supreme Court of Oklahoma, which is by the Court granted, and sixty days *is* by the Court allowed the plaintiffs to prepare and serve case made, and ten days thereafter *is* by the Court allowed defendants to suggest amendments to said case made, same to be settled, signed and filed upon five days' notice by either party. And bond in this case is, by the court, fixed in the sum of $500.00, to be approved by the Clerk of this Court.

And on the same day, the 30th day of July, 1909, come the plaintiffs and file in the office of the Clerk of the District Court for the Third Judicial District of Muskogee County, Oklahoma, a supersedeas bond herein. Said bond being in words and figures as follows, to wit:

In the District Court of Muskogee County, Oklahoma.

No. 6939.

PATSEY PERRYMAN et al., Plaintiffs,
vs.
PEGGIE WOODWARD et al., Defendants.

*Supersedeas Bond.*

Know all men by these presents: That Patsey Perryman, Clory Gross, Isaac Saunders, Sam Saunders, Fred Saunders and William Saunders, principal obligors, and G. E. Burford and —— ——, as sureties, are held and firmly bound unto Peggie Woodward, defendant in the above entitled cause in the sum of Five Hundred ($500) Dollars, for the payment of which well and truly to be made, we, and each of us, do hereby jointly and severally bind ourselves, our successors and assigns.

Dated this 30 day of July, 1909.

The condition of the above obligation is such that:

Whereas, on the 30th day of July, 1909, judgment was rendered in favor of said Peggie Woodward, obligee, defendant in said cause, and against Patsey Perryman, Clory Gross, Isaac Saunders, Sam Saunders, Fred Saunders and William Saunders, the principal obligors, plaintiffs in said cause, dismissing the said cause and

63 *and* vesting the property in controversy in the defendant and for the costs thereof, and

Whereas, the said plaintiffs have taken an appeal from said judgment to the Supreme Court of Oklahoma.

Now, therefore, if the said principal obligors herein shall pay to the said obligees the condemnation money and costs in case judg-

ment or final order shall be adjudged against them, then this obligation shall be void, otherwise to remain in full force and effect.

PATSEY PERRYMAN,
By N. A. GIBSON,
*Her Attorney.*
CLORY GROSS,
By N. A. GIBSON
*Her Attorney.*
ISAAC SAUNDERS,
By N. A. GIBSON,
*His Attorney.*
SAM SAUNDERS,
By N. A. GIBSON,
*His Attorney.*
FRED SAUNDERS,
By N. A. GIBSON,
*His Attorney.*
WILLIAM SAUNDERS,
By N. A. GIBSON,
*His Attorney.*
G. E. BURFORD.

Approved this 30 day of July, 1909.

W. P. MILLER,
*Clerk of the District Court of*
*Muskogee County, Oklahoma,*
By ROSS HOUCK, *Deputy.*

*Qualifications of Sureties on Bonds.*

District Court.

In the District Court of Muskogee County, State of Oklahoma.

No. 6939.

PATSEY PERRYMAN et al., Plaintiffs,
vs.
PEGGY WOODWARD, Defendant.

G. E. Burford, being first duly sworn, upon his oath says that he is a citizen, resident in Muskogee County State of Okla-
64 homa, and that he is worth the sum of One Thousand ($1000.00) Dollars, over and above all his debts, obligations, liabilities and exemptions, and that he has property, goods and effects in said County and within the jurisdiction of said District Court, subject to levy and execution in that amount, and that said property consists of, and is described as follows, to-wit: 70 acres in Sections 8 and 17, Town. 15, Range 19, Muskogee, Okla.

That he owes and is indebted in the sum of — Dollars and no more as follows, to-wit:

G. E. BURFORD.

Subscribed and sworn to before me this 30th day of July, 1909.

[COURT SEAL.] W. P. MILLER,
*Clerk of District Court.*
By ROSS HOUCK, *Deputy.*

Endorsed: No. 6939. Patsey Perryman, et al. Plaintiffs vs. Peggie Woodward et al. defendants. Supersedeas Bond. State of Oklahoma, County of Muskogee. Filed Jul- 30, 1909. W. P. Miller, District Clerk. Gibson & Thurman, Muskogee, Oklahoma, Aattorneys for Plaintiff-.

65 In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

Equity. No. 6939.

PATSY PERRYMAN, CLORY GROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs,
vs.
PEGGY WOODWARD, Defendant.

*Certificate of Attorneys.*

We hereby certify that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete case made.

Witness our hands this 28th day of Sept., 1909.

GIBSON & THURMAN &
BENJ. MARTIN,
*Attorneys for Plaintiffs.*

66 STATE OF OKLAHOMA,
*Muskogee County, ss:*

In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

Equity. No. 6939.

PATSY PERRYMAN, CLORY GROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs,
vs.
PEGGY WOODWARD, Defendant.

*Acceptance of Service, Amendments, and Certificate of Trial Judge.*

I, the undersigned attorney for the defendant in the foregoing suit, certify that the foregoing case made was duly served on me this 28th day of Sept., 1909.

W. W. MOMYER,
BAILEY & WYAND,
*Attorney- for Defendant.*

67 In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

Equity. No. —.

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs,
vs.
PEGGY WOODWARD, Defendant.

*Stipulation of Attorneys.*

It is hereby stipulated and agreed by and between the parties hereto that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered and introduced, all the orders and rulings made and exceptions allowed and all of the records upon which the judgment and journal entry in said cause were made, and the same is a full, true, complete and correct case made; and the said defendant waives the right to suggest amendments to said case made and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the defendant that the judge of said court settle the same and order the same certified to the clerk of the district court and filed according to law; and said defendant

hereby waives the issuance and service of summons in error from the supreme court of the State of Oklahoma.

——— ———,
——— ———,
*Attorneys for Plaintiffs.*
W. W. MOMYER &
BAILEY & WYAND,
*Attorneys for Defendant.*

68 In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

Equity. No. 6939.

PATSY PERRYMAN, CLORY GROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs,
vs.
PEGGY WOODWARD, Defendant.

This is to certify that the foregoing above case made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments had in such cause; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the clerk of the district court attest the same with the seal of said court, and file the same of record.

Witness my hand at Muskogee, this 21st day of March, 1910.

JOHN H. KING, *Judge.*

Attest:
W. P. MILLER, *Clerk.*

Said Original Case Made endorsed as follows: Equity No. 6939. In The District Court For The Third Judicial District, Muskogee County, Oklahoma. Patsey Perryman, et al vs. Peggy Woodward. Case Made Benj. Martin, Jr. Gibson & Thurman, Att'ys for Plaintiffs.

69 *Certificate of True Copy.*

STATE OF OKLAHOMA,
*County of Muskogee, ss:*

I, W. P. Miller, Clerk of the District Court for Muskogee County, Oklahoma, hereby certify the above and foregoing to be a true and complete copy of original case made filed in the above styled and numbered cause, as shown by the records of my office.

In witness whereof, I hereunto set my hand and affix the seal of said District Court this 10th day of May, 1910.

[SEAL.]

W. P. WILLER,
*Clerk of District Court.*
By —— ——, *Deputy.*

70 *Case-made.*

In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

No. 6669.

PATSY PERRYMAN et al., Plaintiffs,
vs.
PEGGY WOODWARD, Defendant.

Be it remembered, that on this 21st day of March, 1910, came on for hearing before the Hon. John H. King, Judge of the District court of the Third Judicial District of the State of Oklahoma, the matter of the settlement of the case-made herein prepared, the parties being present by their Attorneys,

Whereupon the plaintiffs moved to strike from the case-made all of the matters and things contained on pages 116, 117 and 118, said matters so asked to be stricken from the case made, being as follows:

"Mr. THOMAS:

Plaintiff objects to the introduction and consideration of the certified copy of the order of the Probate Court in the matter of the estate of Squire Saunders, deceased, for the reason that said order related exclusively to the personal estate of Squire Saunders and not to real estate and therefore is incompetent, and incidentally to this action for the partition of real estate.

The Court order referred to above being in words and figures as follows, to-wit:

In the United States — for the Northern District of the Indian Territory, Sitting at Muskogee.

71 Probate. No. 454.

In re Administration of the Estate of SQUIRE SAUNDERS, Deceased; SARAH SAUNDERS, Widow.

*Order of Court.*

Now, on this 10th day of November, A. D. 1900, the same being one of the regular judicial days of the September Term, the above styled cause come on for hearing upon the report of S. T. Walrond,

Probate Commissioner, and the Court being advised in the premises finds that said report should be sustained.

Whereupon, it is considered, ordered and adjudged by the Court that it appearing that the estate of said deceased does not exceed three hundred dollars, the said estate do vest absolutely in Sarah Sanders, the Widow of said Squire Sanders, deceased.

It is further ordered that the improvements on Lot 10, of Block 248, of the townsite in Muskogee, and the horse, saddle and bridle, and the other personal property described in the petition of the said widow are declared to be the property of the said widow, and that there be no administration granted upon the estate of the said decedent. The costs of this proceeding, including an allowance of $5 made to the Probate Commissioner are taxed against the said Sarah Sanders.

[SEAL.] JOHN R. THOMAS, *Judge.*

Approved.

I, Chas. A. Davidson, clerk of the United States Court for the Northern District, Indian Territory, do hereby certify that the above and foregoing is a true and correct copy of an order of Court made on the 16th day of November A. D., 1900, in Probate No. 454.

Witness my hand and the seal of said Court this 8th day of December, A. D., 1900.

CHAS. A. DAVIDSON, *Clerk,*
By P. M. FORD, *Deputy.*

Endorsed as follows, to-wit: No. 454, Estate of Squire Sanders, Dec'd. Order of Court.

72 The MASTER: Objection sustained.
Exception by Defendant."

"And to be permitten to insert in lieu thereof the order of the United States Court for the Western District of Indian Territory, in the matter of case No. 454, being the estate of Squire Saunders, said matter so desired and asked to be inserted in lieu of the matter asked to be stricken from the said case-made being as follows:

FRIDAY, November 16th, 1900.

Now, on this day Court met pursuant to adjournment, present and presiding Hon. John R. Thomas, Judge, Court having been opened in due form of law, the following, among other proceedings were had, to-wit:

No. 454. ESTATE OF SQUIRE SANDERS.

Probate Com'r files his report, which is approved and spread of record. Ordered that said personal estate of Squire Sanders, deceased, vest absolutely in his widow, Sarah Sanders, the said

estate amounting in the aggregate to less than $300, and Probate Com'r allowed $5 to be paid by widow, and matter closed.

*Certificate of True Copy.*

UNITED STATES OF AMERICA,
*Indian Territory, Western District, ss:*

I, R. P. Harrison, Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrument hereto attached is a full, true and correct copy of an order as the same appears from the records of my office.

Witness my hand and seal of said Court at Muskogee, in said Territory, this 6th day of Dec. A. D., 1906.

[SEAL.]

R. P. HARRISON, *Clerk,*
By W. R. SHACKELFORD,
*Deputy Clerk.*

73 Whereupon, the Court having heard the statements of the several parties as to the insertion of said matter so asked to be stricken from said case-made, doth overrule the said motion, to all of which the plaintiffs except, and the Court for good cause shown doth extend the time for preparing and serving a case-made 60 days from and after the said 21st day of March, 1910, and doth grant the defendants ten days thereafter to suggest amendments, the same to be settled upon five days 'notice.

74 In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

No. 6939.

PATSY PERRYMAN et al., Plaintiffs,
vs.
PEGGIE WOODWARD, Defendant.

*Certificate of Attorneys.*

We hereby certify that the foregoing case-made contains a full, true, correct and complete copy and transcript of all proceedings in said case covering the motion of the plaintiffs to correct the case-made herein, and all orders and rulings made, and exceptions allowed in said matter, and that the same is a full, true, and correct case-made.

Witness our hands this 30th day of April, 1910.

BENJ. MARTIN,
GIBSON & THURMAN,
*Attorneys for Plaintiffs.*
W. W. MOMYER AND
BAILEY AND WYAND,
*Attorneys for Defendant.*

75 In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

No. 6939.

PATSY PERRYMAN et al., Plaintiffs,
vs.
PEGGIE WOODWARD, Defendant.

*Acceptance of Service.*

We, the undersigned attorneys for the defendant in the foregoing suit, certify that the foregoing case-made was duly served on us this 25th day of April, 1910.

W. W. MOMYER,
J. E. WYAND,
*Attorneys for Defendant.*

76 In the District Court for the Third Judicial District, Muskogee County, Oklahoma.

No. 6939.

PATSY PERRYMAN et al., Plaintiffs,
vs.
PEGGIE WOODWARD, Defendant.

*Certificate.*

This is to certify that the foregoing above case made, and the amendments thereto, have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law by the parties to said cause; that the same as above set forth, and as corrected by me is true and correct, and contains a true and correct statement of all proceedings had in the matter of the attempted correction of the original case-made in said cause, and I hereby settle, allow, certify, and sign the same as true and correct and hereby order that the Clerk of the District Court attest the same with the seal of said Court, and file the same of record.

Witness my hand at Muskogee, this 9th day of May, 1910.

JOHN H. KING, *Judge.*

Attest:
[SEAL.] W. P. MILLER, *Clerk.*

77 *Certificate of True Copy.*

STATE OF OKLAHOMA,
*County of Muskogee, ss:*

I, W. P. Miller, Clerk of the District Court of Muskogee County, Oklahoma, hereby certify the above and foregoing to be a true and complete copy of the supplemental case made filed in the above styled and numbered cause, as shown by the records of my office.

In Witness Whereof, I hereunto set my hand and affix the seal of said District Court this 10th day of May, 1910.

[SEAL.] W. P. MILLER,
*Clerk of District Court.*

Endorsed: Patsy Perryman, et al. vs. Peggie Woodward. Case Made. Filed May 12 1910 W. H. L. Campbell, Clerk. N. A. Gibson & Benj. & Villard Martin, Attorneys for Plaintiffs.

78 In the Supreme Court of the State of Oklahoma, Guthrie, Oklahoma.

No. —.

PATSY PERRYMAN et al., Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

*Waiver of Issuance and Service of Summons.*

Comes now the defendant in error above named and waives the issuance and service of summons herein upon her, and enters her general appearance in said cause.

W. W. MOMYER &
J. E. WYAND,
*Attorneys for Defendant in Error.*

Endorsed: No. 1678. Patsy Perryman et al., Plaintiffs in Error, vs. Peggy Woodward, Defendant in Error. Waiver of Issuance and Service of Summons. Filed May 12, 1910, W. J. Campbell, Clerk. Benj. & Villard Martin Attorneys for ——.

79 In the Supreme Court of the State of Oklahoma.

No. 1678.

PATSY PERRYMAN et al., Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

*Petition to Extend Time of Filing Briefs.*

Come now the above named plaintiffs in error and the defendant in error by their respective attorneys, and respectfully petition this Honorable Court to extend the time within which plaintiff in error is required to file his briefs herein thirty days from June 20, 1910.

GIBSON & THURMAN &
BENJ. & VILLARD MARTIN,
*Attorneys for Plaintiffs in Error.*
BAILEY & WYAND,
W. W. MOMYER,
*Attorneys for Defendant in Error.*

Endorsed: No. 1678. Patsy Perryman, et al., Plaintiffs in Error, vs. Peggy Woodward, Defendant in Error. Petition for extention of time within which to file briefs. Filed Jun- 16, 1910. W. H. L. Campbell, Clerk. Benj. & Villard Martin, Attorneys for plaintiffs in error.

80 And thereafter to-wit, on the 22nd day of June, 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, May Term, 1910, June 22nd, 1910, Eighteenth Judicial Day.

No. 1678.

PATSY PERRYMAN et al., Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

And now on this day it is ordered by the court that the application of plaintiffs in error for 30 days' additional time from June 20th, 1910, to file briefs, be and the same is hereby allowed.

81 In the Supreme Court of Oklahoma, at Guthrie.

No. 1678.

PATSY PERRYMAN et al., Plaintiffs in Error.
vs.
PEGGY WOODWARD, Defendant in Error.

*Stipulation.*

It is hereby agreed and stipulated by and between the parties to the above entitled cause that the defendant in error in said cause may have forty (40) days from this date in which to file brief in said cause in the Supreme Court.

Dated this 9th day of August, 1910.

GIBSON & THURMAN,
BENJ. & VILLARD MARTIN,
*Attorneys for Plaintiff in Error.*
W. W. MOMYER,
BAILEY & WYAND,
*Attorneys for Defendant in Error.*

Endorsed: No. 1678. Patsy Perryman et al., Plaintiff in Error, vs. Peggy Woodward, Defendant in Error. Stipulation. Filed Aug. 10, 1910. W. H. L. Campbell, Clerk.

82 And thereafter to-wit, on the 17th day of August, 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, July Term, 1910, August 17th, 1910, Ninth Judicial Day.

No. 1678.

PATSY PERRYMAN et al., Plaintiffs in Error.
vs.
PEGGY WOODWARD, Defendant in Error.

And now on this day it is ordered by the court that the stipulation herein that defendant in error have 40 days from August 9, 1910, to file brief, be, and the same is hereby allowed.

83 And thereafter to-wit, on the 16th day of January, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, January Term, 1912, January 16th, 1912, Sixth Judicial Day.

1678.

PATSY PERRYMAN et al., Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

And now this cause is submitted on the record and briefs filed herein.

84 And thereafter to-wit, on the 19th day of March, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, March Term, 1912, March 19th, 1912, Sixth Judicial Day.

No. 1678.

PATSY PERRYMAN et al., Plaintiffs in Error.
vs.
PEGGY WOODWARD, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause, be, and the same is hereby affirmed. Opinion by Brewer, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole and judgment is entered accordingly.

85 (Filed Mar. 19, 1912.)

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division No. Two.

No. 1678.

PATSY PERRYMAN, CLORY GROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

*Syllabus.*

Where the owner of an estate, situated in Indian Territory, of less value in the aggregate, than $300.00, died in Indian Territory prior to statehood, an order of the United States Court, exercising its probate jurisdiction, vesting the entire estate in the widow of decedent, was valid; and passed and vested in the widow, all of such estate both real and personal, under section (3) of Chapter (1) of Mansfield's Digest of the laws of Arkansas.

Error from the District Court of Muskogee County.

John H. King, Trial Judge.

Affirmed.

Gibson & Thurman, Thomas & Foreman, Benj. & Villard Martin, Attorneys for Plaintiffs in Error.
W. W. Momyer, Bailey & Wyand, Attorneys for Defendant in Error.

86 Opinion by BREWER, *C.*:

This suit involves the title to a town lot in Muskogee. It was brought as an equitable proceeding, in the United States Court, for the Western District of Indian Territory on September 19, 1906, by the plaintiffs in error as plaintiffs, against the defendant in error, as defendant. Hereafter the parties will be referred to as they were known in the trial court. We summarize the facts, as follows: Plaintiffs were the adult children of one Squire Saunders; on June 4th, 1900, Squire Saunders was in possession and occupying as a home lot 10 Block 248 of the town of Muskogee, Creek Nation, Indian Territory, and was entitled, under the Acts of Congress relating to townsites to have said lot scheduled to him, and the preference right to purchase same at one-half its appraised value; that on said date June 4th, 1900, said lot was so scheduled to him by the townsite commission. That on October 22, 1900, Squire Saunders died intestate, leaving a widow Sarah Saunders, and the plaintiffs his children, him surviving. That a patent to the land

was issued in the name of Squire Saunders by the principal chief of the Muskogee (Creek), Nation approved by the Secretary of the Interior, June 27th 1904; that on November 16th 1900, after the death of Squire Saunders, the United States Court, in the exercise of its probate jurisdiction, made an order determining the value of the estate of Squire Saunders to be less than $300.00, and vesting the same in the widow. About a month after this order was made the widow sold the property in controversy, to the defendant, who paid the consideration, and went into possession of the property; no deed was executed. The defendant was in possession at the time of suit and was not disturbed in her possession by the judgment in the case. The defendant after buying and taking possession of the property paid to the proper officers, all the purchase
87 price for the lot due the Creek Nation under the townsite law.

The evidence was heard by a Master in Chancery, who made findings of fact and conclusions of law, and filed same, together with the evidence taken in the case. The Master found in favor of plaintiffs. Exceptions were filed to the report, and after statehood, the district court for Muskogee County, as successor of the United States Court, heard the exceptions to the Master's report and sustained same. The court made special findings of fact, substantially as stated above, and that there was no equity in plaintiff's petition. A decree was rendered in favor of the defendant.

This appeal is prosecuted to reverse that decree.

There are a number of assignments of error in this case, but they all depend in our judgment, upon the question of the legal effect of the order made by the United States Court on Nov. 16, 1900. It is as follows:

"In the United States Court for the Northern District of the Indian Territory, sitting at Muskogee. Probate No. 454. In re Administration of the Estate of Squire Saunders, deceased. Sarah Saunders, widow. Order of Court. Now on this 16th day of November, A. D. 1900, the same being one of the regular judicial days of the September Term, the above styled cause came on for hearing upon the report of Z. T. Walrond, Probate Commissioner, and the Court being advised in the premises finds that said report should be sustained.

Whereupon, it is considered, ordered and adjudged by the Court that it appearing that the estate of said deceased does not exceed three hundred dollars, the said estate do vest absolutely in Sarah Saunders, the widow of said Squire Saunders, deceased.

It is further ordered that the improvements on Lot 10 Block 248 of the townsite in Muskogee, and the horse, saddle and bridle, and the other personal property described in the petition of the said widow are declared to be the property of the said widow, and
88 that there be no administration granted upon the estate of the said decedent. The costs of this proceeding, including an allowance of $5.00 made to the Probate Commissioner are taxed against the said Sarah Saunders.

Approved.

[SEAL. JOHN R. THOMAS, *Judge.*"

This order was made in pursuance of the law of Arkansas, in force in Indian Territory at the time the rights of the parties to this suit arose. Mansfield Digest (Ark.) Sec. 3 Chapter (1) is as follows:—

"When any one shall die leaving a widow or children, and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order that the estate vest absolutely in the widow or children, as the case may be; and in all cases when the estate does not exceed eight hundred dollars the widow or children, as the case may be, shall be entitled to retain the amount of three hundred dollars of the property at cash price."

If this judgment had the effect, under the law in force at the time of passing the estate of Squire Saunders, in the lot in controversy absolutely, and vesting same in his widow Sarah Saunders, then the judgment of the court in this case, is not contrary to the law; or the evidence; the motion for new trial was properly overruled; the report of the Master should not have been confirmed; and the judgment for defendant was correct, thus disposing of the main assignments of error urged by plaintiffs. We think it had such effect.

The law of Arkansas being in force in Indian Territory at the time of the transactions shown in this record, the interpretation given the statute involved, by the Supreme Court of that State, prior to its adoption by Congress as a law in Indian Territory, is controlling.

This statute had been fully considered and construed by the Supreme Court of Arkansas before its adoption. In Harrison vs. Lamar, 33 Ark. 824, it was held that the word "Estate" used
89 in the statute means the whole "Mass" of decedent's property both real and personal; and that, if at the date of his death, a decedent's property is of less than $300.00 in value, that it is given by the law proprio vigore to the widow, and that an order of the probate court is not necessary to vest it. This case also holds that a proceeding in the probate court to declare the estate in the widow, is in rem, and that no notice to heirs is necessary, and that the order need not recite all the jurisdictional facts. We quote from the body of the opinion in the Harrison case, supra:—

"There are no grounds for drawing a distinction between real and personal property in the construction of these acts. If there were any, the "estate" must be considered as more aptly referring to real property. But under our system of administration, which regards the whole mass of property, real and personal, as assets for some purposes, in the hands of the administrator the word estate has acquired a wider application in a popular sense, and in this sense, doubtless, the Legislature meant to use it. It means the mass of property left by decedent, and if that, in the aggregate, should be less than $300.00 in value, the intention of the acts, taken together, is to give it to the widow, if living, or if there be no widow, to minor children".

And further:—

"It is a proceeding in rem, fixing the status of the property as to ownership, and declaring to all the world the course of devolution

which, under the circumstances, the law gave to the property of the deceased. It did not vest the right so much as declare it, and it was not necessary that it should specify the personal property, or describe the lands by metes, bounds or numbers. It carried the whole property without reserve, leaving nothing to be determined with regard to its identity, but the fact that it was part of the estate left by decedent."

And further:—

"The statute does not prescribe any notice to be given to heirs or distributees. As to these small estates, they have no prima facie rights, the amount of the estate being admitted. They are taken out of the course of devolution prescribed to larger ones, and there being no right to be divested out of them, there is no other reason for making them parties than that they should have the right to question the amount of the estate."

And further:—

"The property, by the order, vested absolutely in fee simple, in the widow."

90 In Hampton vs. Physick, 24 Ark. 562, the Syllabus reads:—

"Although the probate court may fail to make an order vesting the entire estate of a deceased husband in the widow, when it does not exceed three hundred dollars, she may, in a proceeding against her to account for the estate, show that it did not exceed that sum, and thus avail herself of the benefit of the statute."

Other cases more or less in point are, Word Admr. vs. West, 38 Ark. 243, Smith et al. vs. Allen, 31 Ark. 268.

It is well settled that possession of land under a contract of purchase where the consideration has been paid, entitles the purchaser to have specific performance of the contract. Kellums vs. Richardson, 21 Ark. 137.

Prior to the issuance of patent, the schedulee, was the equitable owner of the lot under the doctrine of De Gaffrenried vs. Iowa L. & T. Co. — Okla. — 95 Pac. 624.

If Squire Sanders, the schedulee, after the lot had been scheduled to him, had conveyed it to another, as was done in thousands of cases in Indian Territory before the payments had been made and patents issued, would any one doubt but that his vendee would have taken all his estate in the lot? We think not. Then if the law, under the facts, provided a devolution of the property, as an exception to the general rule, because of the insignificance of the estate, and by it passed the lot to the widow, she must have secceeded to his entire interest and estate in the lot.

"One who sells land, for which no patent has been issued by the Government will, upon issuance to him of the patent, hold title as trustee for his vendee."

Moore vs. Maxwell, 18 Ark. 469, Peay vs. Capps, 27 Ark. 163.

If the law devolved the entire equitable ownership of this lot upon the widow, Sarah Saunders, and we hold that it did; and she con-

veyed it to defendant, and we hold that she did; then it would
91 have been inequitable, in a proceeding in equity, to decree the possession, rents and profits and a partition of the lot, upon the prayer of those holding, at most, the naked legal title.

"Equity regards that as done which ought to be done". A discussion of this maxim, appropriate to the instant case, is found in Pomeroy's Equity Jurisprudence (2nd. Ed.) Sec. 375, as follows:—

"The principle is no less truly and directly the source of the equitable ownership regarded as held by the beneficiary in all trusts which arise by operation of law, resulting, implied, or constructive. Although the fiduciary relation is not created by the terms of any direct conveyance, devise, assignment, agreement, yet by the settled doctrines of the equity jurisprudence, an equity exists between the parties which is treated as work out; an obligation to convey the subject-matter rests upon the holder of the legal title, which is treated as though performed. Some modern judges of great learning and ability have said that the relations commonly known as "constructive" or "resulting" trusts are only trusts sub modo, are called trusts only by way of analogy, and for want of a better and more distinctive name. Even if this criticism upon the ordinary nomenclature be well founded, it does not deny, and was not intended to deny, the existence of the real, beneficial, equitable property in the beneficiary. He is admitted to be the equitable owner, with all the incidents of ownership, although the legal title is vested in another person. The beneficiary may not have anything which the law requires as a "title", he may even be without any written evidence of his right, his proprietorship may rest wholly upon acts and words, but still he is the equitable owner because equity treats that as done which in good conscience ought to be done."

The remaining assignment of error, relates to the action of the court in overruling plaintiff's motion to strike from the case made, the order of the United States Court, supra; this is brought to our attention by a bill of exceptions allowed by the court.

This order appears in the testimony filed with the report of the Master in Chancery, and is followed by this statement of the Master:—

92 "The foregoing testimony, together with the exhibits hereto attached, was all the evidence offered in the case.

CLARK J. TISDEL,
*Master in Chancery.*"

It appears in the body of the testimony and is not merely exhibited as are certain other documents. There was no proof taken on the question as to this order being the identical one put in the evidence, and counsel has not argued the matter in their brief, nor suggested any good reason why the court should have stricken it from the evidence, and from examining the record, we find none; and the record being against the contention, it cannot be sustained.

Upon a review of the whole record we have no doubt but that the decree of the court was equitable and just and ought to be affirmed.

March 19, 1912.

By the COURT: Adopted in whole.

93 In the Supreme Court of the State of Oklahoma, Before the Supreme Court Commission, Division No. 2.

PATSY PERRYMAN, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, William Saunders, and Clory Gross, Plaintiffs in Error,

vs.

PEGGY WOODWARD, Defendant in Error.

*Motion.*

Comes now Fenn Gross, by his next friend, Patsy Perryman, and moves the court to set aside and vacate the order of submission herein, and the decision of the court in said cause, upon the grounds and for the reasons following, to-wit:

That heretofore, to-wit; on or about the 24th day of December, 1910, the said Clory Gross died intestate in Muskogee County, State of Oklahoma, and that this court was without jurisdiction to enter the order or try the said cause, and moves the said court to enter herein an order of reviver, reviving the said cause, in the name of Fenn Gross, by his next friend, Patsy Perryman, and submits in support hereof the affidavit of Patsy Perryman, verifying the said facts alleged herein.

GIBSON & THURMAN,
BENJ. & VILLARD MARTIN &
THOMAS & FOREMAN,
BLAKENEY & MAXEY,
*Attorneys for Plaintiffs in Error.*

94 STATE OF OKLAHOMA,
*Muskogee County:*

Patsy Perryman being first duly sworn, on oath deposes and says, that Clory Gross was her sister, and one of the plaintiffs in error in case No. 1678 pending in the Supreme Court of the State of Oklahoma, wherein Patsy Perryman et al. were plaintiffs, and Peggy Woodward was defendant.

That Clory Gross died subsequent to the filing of the appeal in said cause, to-wit: on or about the 24th day of December, 1910, intestate, in Muskogee County, said State, leaving as her sole and only heir, Fenn Gross, a minor, now of the age of about fourteen years, and that no proceedings have been instituted to administer upon the estate of the said Clory Gross, and none is pending at this time, and no letters of administration have been issued thereon.

her
PATSY x PERRYMAN.
mark.

(Witness to mark
B. B. BLAKENEY.)

Subscribed and sworn to before me this 20th day of March, 1912.
[SEAL.] [illegible]
*Notary Public.*

*My commission expires* Nov. 7, 1915.

Endorsed: 3670. Perry Pumpum vs Perry Woodward. Motion Filed Apr. 1 1912. W. H. L. Campbell, Clerk.

95 In the Supreme Court of the State of Oklahoma, Before the Supreme Court Commission, Division No. 2.

Perry Pumpum, Isaac Gutcumb, Pam Gutcumb, Gus Sundun, William Sundun, and Clary Gum, Plaintiffs in Error.

vs.

Perry Woodward, Defendant in Error.

*Petition for Rehearing.*

Come now the plaintiffs in error above named, and petition the said court for a rehearing in said cause, and upon such rehearing to vacate the former order made herein affirming the said cause, and to reverse the same and enter judgment entered for the plaintiffs in error, or remanding the same with directions to grant a new trial, upon the grounds and for the reasons following, to-wit:

I.

That the said court erred in its conclusions and determination of law as stated in the syllabus filed in said cause, in holding that where the owner of an estate, situated in Indian Territory, of less value in the aggregate, than $5000.00, died in Indian Territory prior to statehood, an order of the United States Court, exercising its probate jurisdiction, vesting the entire estate in the widow of the intestate, was valid; and passed and vested in the widow, all of such estate both real and personal, under section (3) of Chapter (3) of Mansfield's Digest of the laws of Arkansas.

II.

That the said court erred in holding that the said purported order bearing date of November 15th, 1909, affected the property in controversy in said action, for the reason that the said order expressly gave only the improvements on Lot Two (11) in Block Two Hundred Forty-eight (248) to the said surviving widow, Susie Sundun.

III.

That the said court erred in its conclusion that Lot Two (11) in Block Two Hundred Forty-eight (248), upon which the [illegible]

and his surviving widow were residing at the time of his
96 death, and which was the homestead of the parties, was affected by Section 3 of Chapter 1 of Mansfield's Digest, or that said property was governed by said section 3 of chapter 1.

IV.

The said court erred in overlooking the fact that the title to the lot in controversy was vested in the Creek Tribe of Indians, and the rights to the improvements thereon, and to the title thereto would pass under the law of descent and distribution existing in and among the Creek Tribe of Indians, and not affected by any of the provisions of the laws of Arkansas in force in the then Indian Territory.

V.

The court erred in its conclusions and determination, in holding that section 3 of chapter 1 of the Mansfield's Digest, vested the property in controversy in the surviving widow, for the reason, as appears from the record, that the deceased, Squire Saunders, was a Cherokee citizen and his property passed, under the laws in force in the Cherokee Tribe of Indians, unaffected by any laws of Arkansas then in force in the said Indian Territory.

VI.

The court erred in its determination of the said cause in overlooking the provisions of the said order or purported order, which modified the former general adjudication in the said purported order, in this; that the first provision of said order, vesting the homestead of the said Squire Saunders, deceased, in his said widow, Sarah Saunders, was modified by the last portion and provision of said order, vesting only the improvements on Lot Ten (10) in block 248 of the townsite of Muskogee, and other personal property, in the said Sarah Saunders.

VII.

The said court erred in overlooking the order of the said court as shown in the bill of exceptions and made a part of the casemade, showing that the court had under consideration only an application to set aside certain personal property and vest the same in the surviving widow, and its order with reference to the real estate in controversy, was in excess of jurisdiction, and void.

97 VIII.

That the court overlooked the fact that the said purported order incorporated in the said casemade, bearing the purported date of November, 16, 1900, was in fact not the order of the court, but was erroneously incorporated therein.

IX.

That the judgment and decree in said cause was procured by irregularity of the prevailing party, and accident and mistake of the clerk of the United States Court, in the following particulars, to-wit: that one Peggy Woodward, the defendant herein, procured in some manner unknown to these plaintiffs, a certified purported order, which appears in the casemade at page 35, purporting to have been a certified copy of an order made by the United States Court for the Northern District of the Indian Territory, sitting at Muskogee, on the 16th day of November, 1900, and made the same a part of the said record, when in truth and in fact the record shows that no such order was made, and no such order was of record in the United States Court for the Northern District of the Indian Territory, but that in fact the only order made by the said United States Court, and of record therein, is the order appearing on page 3 of the bill of exceptions attached to the said casemade and made a part thereof, and that at the trial of the said cause before the Master in Chancery, the said plaintiffs in error finding that the said order was duly certified, were induced by the said Peggy Woodward to believe, and did believe that the said order was regular and had been properly made by the said United States court, but they have since discovered that the same was not made, and the clerk of the said court by mistake, accident or inadvertence certified to the same as a true and correct copy, and that the same ought to be stricken from the said casemade, and not considered by the said court, and that under the opinion rendered by the Honorable Commission herein, the said decision being based on said erroneous order the judgment was erroneous, and should be withdrawn and the said cause reversed, with direction to grant a new trial.

X.

That the said Honorable Commission overlooked and mis-
98 construed and misapplied the law in force, with reference to the administration upon and the law of descent and distribution, in the said Indian Territory, prior to the adoption of the constitution of said state, in this, to-wit; that the said Commission in holding that the interest of the said Squire Saunders, deceased, in said lot in controversy, being real estate, was not governed or affected or controlled by the laws of the state of Arkansaw, put in force in the said Indian Territory.

XI.

That the said court in its decision has overlooked the statutory provisions and decisions of the Supreme Court of the State of Arkansas, and of this state, and of the Court of Appeals of the Indian Territory, controlling, in the disposition of said cause, and which, if properly applied, would necessitate and result in the reversal of said cause.

Wherefore plaintiffs in error pray that a rehearing be granted

and upon a final hearing in said cause, after said rehearing, that the order and judgment of the District Court of Muskogee County, be reversed and vacated, and there be entered in said cause, judgment for the plaintiffs in error, and for such other relief as the premises justify, including the costs of both courts.

BLAKENEY & MAXEY,
*Attorneys for Plaintiffs in Error.*

Endorsed: #1678. Patsy Perryman vs. Peggy Woodward. Motion for Rehearing. Filed Apr. 1, 1912. W. H. L. Campbell, Clerk.

99 In the Supreme Court of the State of Oklahoma, Before the Supreme Court Commission, Division No. 2.

PATSY PERRYMAN et al., Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

*Motion.*

Come now all of the above named plaintiffs in error, except Clory Gross, and move the court to allow the said plaintiffs thirty days in which to file a brief in support of the petition for rehearing filed herein.

GIBSON & THURMAN,
THOMAS & FOREMAN,
BENJ. & VILLARD MARTIN,
BLAKENEY & MAXEY,
*Attorneys for Plaintiffs in Error.*

Endorsed: 1678. Patsy Perryman vs. Peggy Woodward. Motion. Filed Apr. 1, 1912. W. H. L. Campbell, Clerk.

100 And thereafter, to-wit, on the 2nd day of April, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, March Term, 1912, April 2nd, 1912, Eighth Judicial Day.

No. 1678.

PATSY PERRYMAN et al., Plaintiff- in Error,
—
PEGGY WOODWARD, Defendant in Error.

And now on this day it is ordered by the court that the mandate of this court in the above entitled cause, be, and the same is hereby stayed, and plaintiff in error is given thirty days in which to file his brief on petition for rehearing, and defendant in error is given twenty days thereafter in which to reply.

101 In the Supreme Court of the State of Oklahoma.

No. 1678.

PATSY PERRYMAN et al., Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

It is agreed by and between attorneys for the parties hereto that the defendant in error may have thirty (30) days from this date in which to file her brief on a motion for re-hearing. Dated May 3rd 1912.

THOMAS & FOREMAN,
GIBSON & THURMAN,
BENJ. & VILLARD MARTIN,
BLAKENEY, MAXEY & MILEY,
*Attorneys for Plaintiffs in Error.*
W. W. MOMYER,
BAILEY & WYAND,
*Attorneys for Defendant in Error.*
—— ——, *Attorneys for Defendant.*

Endorsed: No. 1678. In the Supreme Court of the State of Oklahoma. Patsy Perryman, et al., Plaintiffs in error, vs. Peggy Woodward, Defendant in error. Stipulation. Filed May 7, 1912. W. H. L. Campbell, Clerk.

102 And thereafter, to-wit, on the 19th day of June, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, June Term, 1913, June 19th, 1913, Eighth Judicial Day.

No. 1678.

PATSY PERRYMAN et al., Plaintiffs in Error,
vs.
PEGGY WOODWARD, Defendant in Error.

And now this cause comes on for hearing on petition for rehearing, briefs and record filed herein.

And the court having considered the same find that the judgment of the lower court in the above cause should be affirmed. Opinion by Rosser, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

103 (Filed June 19, 1913.)

In the Supreme Court of the State of Oklahoma.

No. 1678.

PATSY PERRYMAN, CLORY CROSS, ISAAC SAUNDERS, FRED SAUNDERS, SAM SAUNDERS, and WILLIAM SAUNDERS, Plaintiffs in Error,

vs.

PEGGY WOODWARD, Defendant in Error.

On Rehearing.

*Syllabus.*

1. Under the law in force in the Indian Territory prior to Statehood, where a copy of a judgment was offered in evidence before a Master in Chancery, excluded by him and exceptions saved by the party offering it, it was not error for the Court, upon sustaining the exceptions to the report of the master, to consider the judgment so offered without re-referring the case to the master, where the judgment was copied into the report of the master and was properly admissible in evidence.
2. Where a town lot in the Creek Tribe was scheduled to the owner of the improvements and after his death was sold by the person in whom the law vested the improvements, and the payments due the Tribe were paid by such purchaser, the patent from the Tribe in the name of the deceased owner of the improvements inured to and carried title to such purchaser.
3. Sec. 3 of Chap. 1 of Mans. Dig., of the Stats. of Ark., was not locally inapplicable and was extended over and put in force in the Indian Territory by the Act of Congress of May 2. 1890, (23, Stat. L. 81), although repugnant to the constitution of Arkansas so far as it affected homesteads; and an order of the probate court vesting the entire estate of a deceased person in the widow of the deceased, was valid and effective where the entire estate did not exceed three hundred dollars in value, though a portion of the estate consisted of improvements on a town lot occupied as a home.

Blakeney & Maxey, Gibson & Thurman, Benj Martin, Thomas & Foreman, for Plaintiffs in Error.

W. W. Momyer, J. E. Wyand, for Defendant in Error.

Opinion by ROSSER, *C.*:

Three grounds for reversal are urged in the petition for rehearing in this case. It is urged that the case must be reversed be-
104 cause the order of the probate court, vesting the improvements on the lot in controversy in the widow of Squire Saun-

ders, was not received in evidence at the hearing before the master. The report of the master shows that the order was offered in evidence, but excluded by him. The order, however, is set forth at length in the report and was considered by the court in passing upon the exceptions to the master's report. The record with reference to the order shows the following:

"By the MASTER: Case closed, with exception of a certified copy of the order in probate case of the estate of Squire Saunders, which it is agreed by Judge Thomas shall be introduced subject to his objection when he has seen it, and that made closes the case.

Mr. THOMAS: Plaintiff objects to the introduction and consideration of the certified copy of the order of the probate court in the matter of the estate of Squire Saunders, deceased, for the reason that said order related exclusively to the personal estate of Squire Saunders and not to real estate, and therefore is incompetent and inadmissible in this action for partition of real estate."

The master sustained the object- to the order apparently upon the ground raised by the objection. The material portion of the order of court is as follows:

"Whereupon it is considered, ordered and adjudged by the court that it appearing that the estate of said deceased does not exceed $300.00, said estate be vested absolutely in Sarah Saunders, the widow of said Squire Saunders.

It is further ordered that the improvements on lot 10 in block 248 of the township in Muskogee, a horse, saddle and bridle, and the other personal property described in the petition of the said widow and declared to be the property of said widow, and that there be no administration granted upon the estate of the decedent."

This question does not appear to have been especially called to the attention of the trial court in motion for new trial, unless by the general allegation of error that the judgment was contrary to law. It is claimed that the statutes prevented the court from considering the evidence offered as part of the record and required it to re-refer the matter to the master. Sec. 5269 of Mans. Dig. provides that,

"if either party shall except to the competency of any witness or to the admission or exclusion of evidence, the master, if required, shall state the particulars of the exception in his report."

Sec. 5273 provides that,

"exceptions may be allowed to the Master's report, where he admitted incompetent testimony or where he excluded com-
105 petent testimony, or for any other cause which may be adjudged good by the Court, or when it shall be apparent from the face of the report that injustice had been done."

Sec. 5274 provides that,

"When exceptions are allowed, the court may refer the report to the master again with such instructions as may be necessary."

Sec. 5274 provides that,

"Where exceptions have been allowed to the master's report, and

the account shall have been restated by the court or master, a decree shall be entered accordingly."

It will be seen from the section last quoted that the court, under the law in force in the Indian Territory prior to statehood, was not required to re-refer all cases in which exceptions are allowed. The court could pass upon the case without re-referring it; and this is the general rule. American Freehold L. & Mort. Co., v. Pollard, 132 Ala. 155; McHenry v. Moore, 5 Cal. 90; Davis v. Roberts, 1st Smede & Marshall Chan. (Miss.) 543; Taylor v. Read, 4 Paige Chan. (N. Y.) 560; Gaines v. Brockerhoff, 136 Pa. St. 175; Huston v. Cassidy, 14 N. J. Eq. 320.

The order of the probate court vesting the property in the widow was offered in evidence. While the master excluded it, he copied it in his report and sent it up to the court where it was treated as before the court. The judgment of the court was based upon it. It was not urged or contended that the probate order was not entered or that it was not in all respects regular. The only objection made to it was that it was made with reference to personal estate and not real estate. Its existence is not challenged anywhere in the proceedings. It does not seem that the law would require the case to be reversed and sent back for the purpose of formally offering and receiving in evidence certified copy of the judgment which nobody disputes was entered and which was offered in evidence and treated by the court as if it had been regularly offered in evidence. The court merely sustained the third exception urged by the defendant, which was that the master erred in refusing to admit the order of court in evidence, and refusing to consider it himself. As was said by Mr. Chief Chief Justice Taney, in the case of Kelsey v. Hobby, 16 Peters, 269, 10 L. ed. 961.

106 "There is no propriety in requiring technical and formal proceedings when they tend to embarrass and delay the administration of justice, unless they are required by some fixed principles of equity, law or practice, when the court would not be at liberty to disregard."

The case is different from cases in which oral evidence offered has been excluded by the master. In those cases it must be referred in order that the party objecting may be allowed to cross examine the witness, if his evidence is considered admissible. Even in those cases, according to the practice in most states, the witness may be offered the court to be heard by him rather than have the case re-referred. But in the present case there was nothing to cross examine. It was record evidence and the existence of the record was practically admitted and it was considered by the court.

It is next contended that the order did not pass title to the land to the defendants, and that the deed from the Principal Chief of the Creek Nation to Squire Saunders carried the title to his heirs and not the defendant, Peggy Woodward, who bought the property from his widow. Under the treaty with the Creek Nation the right to buy the land from the government depended upon the ownership of the improvements on the land. The order of court vested

the title to the improvements in Squire Saunders' widow, and she sold them to the defendant. The defendant then paid the purchase price to the Creek Nation. That vested her will full title. It is argued that where the person in whose name the lot was scheduled died before receiving title, that the deed from the principal chief conveyed the land to his heirs in the same way that it conveyed land to the heirs of a deceased allottee. This argument is based upon the language of Sec. 23 of the original Creek Treaty, which is in part as follows:

"The Principal Chief shall in like manner and with like effect execute and deliver to proper parties deeds of conveyance in all other cases herein provided for."

It is claimed that this section gave the deeds to town lots the same effect that it did to patents or deeds to allottees. The deed in this case was made since the passage of the Act of April 26, 1906. The provisions of Sec. 5 of that Act are as follows:

107 "That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before said patent or deed becomes effective, the title to the land described therein shall inure to and vest in his heirs."

It is argued that under this section the patent from the Principal Chief vested the title in the heirs. This argument is not tenable. Sec. 5 of the Act of April 26, 1906, was passed several years after the original Creek treaty was made, and Sec. 5 of said Act was intended to apply only to allotments. Allotments could not be sold prior to their selection, but there was no such prohibition with reference to the sale of town lots. They could be sold at any time, and thousands of titles in the towns on the Indian Territory side of the State would be rendered defective if it should be decided that a patent from the Principal Chief of the Tribes conveyed the land to the heirs, notwithstanding they or the owner of the lot may have sold it prior to the execution of the patent. In such cases Sec. 642 of Mans. Dig., (which was only declaratory of the common law) applied and the patent inured to the benefit of the grantee of the patent. The heirs in this case inherited nothing, because the property was worth less than $300/00, and vested in the widow.

Lastly, it is urged that Sec. 3 of Chap. 1 of Mans. Dig., under which the defendant in this case claims that the order of the court vesting title in her grantor was made, was not in force in Arkansas at the close of the session of the General Assembly of the State of 1883, as published in 1884, in a volume known as Mans. Dig. because it was in conflict with the constitution of Arkansas with reference to homesteads. It was held in Arkansas, in the case of Sampson v. Harold, 51 Ark. 429, that where the estate, or a portion of it, was homestead it would not vest in the widow, although it might not exceed $300.00 in value, because the devolution of the homestead was provided for by Sec. 6 of Art. 9 of the Constitution of Arkansas, which provided that the homestead should vest in the widow

108 during her natural life, with remainder to the children. But in the case of Chappel v. Gidney, No. 2664, recently decided

by this Court, it was held in an opinion by Mr. Justice Kane that the statutes mentioned in Sec. 31 of the Act of May 2, 1890, were extended over the Indian Territory if not locally inapplicable, whether they were in force in Arkansas or not. Sec. 3 of Chap. 1 of Mans. Dig., was not locally inapplicable, and it was extended over the Indian Territory, notwithstanding that it conflicted with the provisions of the Constitution of Arkansas referred to. The order of the Court vesting the improvements in the widow of Squire Saunders was therefore valid and conveyed title.

The former opinion affirming the judgment of the lower court is adhered to.

June 19, 1913.

By the COURT: Adopted in Whole.

109 In the Supreme Court of the State of Oklahoma.

No. 1678.

PATSY PERRYMAN, Plaintiff in Error.
vs.
PEGGY WOODWARD, Defendant in Error.

*Motion.*

Comes now the plaintiff in error in the above entitled cause, and moves the court for an order granting permission to withdraw the case made in the above entitled cause, for the purpose of perfecting the appeal in said matter, to the Supreme Court of the United States.

BLAKENEY & MAXEY,
*Attorneys for Plaintiff in Error.*

Applicant is permitted to withdraw record in above styled cause for 30 days for the purposes mentioned in foregoing motion.

7/5/1913.

SAMUEL W. HAYES,
*Chief Justice.*

Endorsed: 1678. Patsy Perryman et al. vs. Peggy Woodward. Application to withdraw record. Filed Jul- 5, 1913. W. H. L. Campbell, Clerk. Blakeney & Maxey, Att'ys for P't'f.

110 In the Supreme Court of the State of Oklahoma.

*Certificate.*

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 109 pages, numbered from 1 to 109 both inclusive, are a full, true and complete

transcript of the record and all proceedings in said Court in Cause #1678, Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, Plaintiffs in Error, vs. Peggy Woodward, Defendant in Error, as the same remains on file and of record in my office.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court, at Oklahoma City, this 4th day of October, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,900. Oklahoma Supreme Court. Term No. 277. Patsy Perryman, Clory Cross, Isaac Saunders, et al., plaintiffs in error, vs. Peggy Woodward. Filed October 13th, 1913. File No. 23,900.

*In the*

**SUPREME COURT OF THE UNITED STATES.**

*October Term, 1914.*

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**No. 207.**

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**PATSY PERRYMAN,** *et al.,* - - *Plaintiffs in Error,*

*vs.*

**PEGGY WOODWARD,** - - - *Defendant in Error.*

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## STATEMENT.

This action involves the title of a lot in the City of Muskogee severed and allotted by the Creek Township Commission to Sylvia Sanders, who, after said allotment, on the 22nd day of October, 1902, died intestate before the issuance of a patent, leaving her surviving his widow, Sarah Sanders, and several children. The United States Court for the Western District of the Indian Territory having jurisdiction of the estate of the deceased under the provisions of the Arkansas law extended in force to the Indian Territory, entered its decree vesting the title of the lot in the widow to the exclusion of the children. The widow, Sarah Sanders, then conveyed the land and the defendant in error acquired her title through said conveyance by Sarah Sanders. The question decisive of the case in the state court was: Did Sarah

Sanders, the widow, acquire the property in virtue of said decree of the United States Court for the Western District of the Indian Territory acting in probate? Though the plaintiffs in error attempted to inject other matters, this was the decisive point in the case. The opinions of the state court both original and on rehearing are found in 37 Okla. 792, 799.

We submit our contentions under the following propositions or heads:

I.

No federal question is presented; the decision of the state court involves only a question of mere local law and practice. The defendant in error herewith presents her motion to dismiss the writ of error.

II.

Where a town lot in the Creek Nation, Indian Territory, was scheduled to the owner of improvements thereon, who was entitled to purchase the lot, and after his death the lot was sold by the person in whom the law vested the improvements, upon full payment having been made and the issuance of the patent in the name of the deceased schedulee, the patent inured to the benefit of the purchaser.

III.

The state court correctly construed and applied the law of Arkansas in force in the Indian Territory authorizing the probate court to vest an estate of less than three hundred dollars in the widow.

## BRIEF *and* ARGUMENT.

### I.

### The Writ of Error Should Be Dismissed.

The motion of the defendant in error to dismiss appears herein as an appendix. It states as grounds for dismissal the facts incorporated in the foregoing statement of the case.

Section 3, Chapter 1 of Mansfield's Digest of the laws of Arkansas extended in force in the Indian Territory, provides:

> "When any one shall die leaving a widow or children and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order that the estate vest absolutely in the widow or children, as the case may be, and in all cases where the estate does not exceed eight hundred dollars the widow or children, as the case may be, shall be entitled to retain the amount of three hundred dollars of the property at cash price."

The Creek Townsite Commission having awarded to Squire Sanders the lot in controversy because of his right of occupancy and improvements thereon, he thereby acquired a right which he, his heirs, devisees or grantees might ripen into a full title. When, on the 16th day of November, 1900, the probate court under the foregoing statute awarded the

property to the widow, she was thereby vested with all the right in said land which Squire Sanders had owned in his life time. As to whether or not the award was properly made under the Arkansas law extended in force in the Indian Territory, and as to whether or not the lower court erred in matters of practice at the trial of this case—all these things are matters of local law, and the decision of the state court thereon is not subject to review by this court.

—*Chever* v. *Horner,* 142 U. S. 122, 35 Law Ed. 959;

*Kennedy's Executors* v. *Lessee of Jonothan Hunt,* 7 Howard 590, 12 Law Ed. 829;

*John* v. *Paullin,* 231 U. S. 583, 58 Law Ed. 381;

*McDonough* v. *Millaudon,* 3 Howard 693, 11 Law Ed. 787;

*Carpenter* v. *Williams,* 9 Wall. 785, 19 Law Ed. 827.

Beginning at page 15 of the brief for the plaintiffs in error they attempt to involve the construction of certain acts of Congress and treaties made with the Creek Nation, and commencing at page 29 they make an argument seeking to involve the construction of section 31 of an Act of Congress approved May 2, 1890, and in their supplement to the brief they ask the court to construe Section 32 of the Act of Congress of June 25, 1910. The discussion of these three Acts of Congress is too far afield to need answer. Their construction is not involved even re-

motely in this case. The decision of the state court turns altogether upon the one point that the probate court had set aside to the widow an estate less than three hundred dollars so that the same became her absolute property under the Arkansas laws extended in force in the Indian Territory—the territorial or local laws. Congress extended in force in the Indian Territory a great body of Arkansas statutes as same appeared in Mansfield's Digest. There came at the time of adoption a chapter on replevin. This case no more involves a federal question than would the decision of the state court in a replevin action where the state court has construed the replevin statute extended in force in the Indian Territory by adoption from Arkansas.

## II.

### The Patent Inured to the Purchaser.

Counsel for the plaintiffs in error seem to make the point that Congress vested the title in the heirs of Squire Sanders rather than in the purchaser from the widow. We take it that it is well settled that by relation the patent issued after the death of one entitled to receive it, either in his own name or in the name of his heirs, inures to the benefit of the heirs or devisees or to the purchasers from the heirs or devisees. This court has reached this conclusion, we understand, where there was no statute so providing. The several Acts of Congress cited upon

behalf of plaintiffs in error as to the effect of patents merely go to the point that the issuance of a patent after the death of the party entitled to receive it does not change the situation from what it would be had same issued during the life of the person first entitled thereto. The heirs cannot be heard to say, even if there were no statute on the question, that the purchaser is in worse situation for having purchased the land before the issuance of a patent.

The Supreme Court of Oklahoma upon rehearing in its decision in this case, at page 71 of the record, 37 Okla. 799, covers this point so conclusively that we deem further citation unnecessary.

## III.

**Section 3, Chapter 1, Mansfield's Digest of the Statutes of Arkansas was in force in the Indian Territory and applicable to the estate here involved.**

In the case of *Chappel* v. *Gidney*, 38 Okla. 596, the Supreme Court of Oklahoma held that the statutes contained in Mansfield's Digest of the Laws of Arkansas adopted for the Indian Territory and not locally inapplicable, became the laws of the Indian Territory *whether in force in Arkansas or not.* That rule seems to be thoroughly sound and the same is decisive of the question here involved.

But if this court should hold that the Supreme Court of Oklahoma was in error in announcing the

rule in *Chappel* v. *Gidney, supra,* still the defendant in error must prevail here because the statute in question *was in force in Arkansas.* The Constitution of Arkansas which was never extended in force in Indian Territory, limited the field for the operation of this statute in Arkansas by providing a particular method of descent of the family homestead. The statute under which the probate court of the Indian Territory set aside to this widow the land as an estate less than $300.00 was in full force in Arkansas as to all estates not homesteads. The Constitution of Arkansas merely provided an exception, so that the statute did not operate on the family homestead; but since the Constitution of Arkansas did not come to the Indian Territory with the statutes the exception never came.

The situation is exactly the same as if Congress had provided that the statutes of Arkansas should be extended in force in Indian Territory but that the Constitution of that state should not be extended in force here, and should have no application in the Indian Territory to modify or affect the statutes put in force here.

Respectfully submitted,

JOSEPH C. STONE,
*Attorney for Defendant in Error.*

*In the*
SUPREME COURT OF THE UNITED STATES.
*October Term, 1914.*

No. 227.

PATSY PERRYMAN, *et al.*, - - *Plaintiffs in Error,*

*vs.*

PEGGY WOODWARD, - - - *Defendant in Error.*

## MOTION *to* DISMISS WRIT *of* ERROR.

Comes now Peggy Woodward, the defendant in error, and moves that the writ of error herein be dismissed for the following reason, to-wit:

There was not any right, title or privilege under any Act of Congress set up or decided against in the state court, but its decision was based wholly on the local law and practice.

This case involves the title of a town lot in the City of Muskogee, Oklahoma, formerly the Indian Territory, scheduled by the Townsite Commission to one Squire Sanders, who died intestate on the 22nd day of October, 1900, leaving him surviving his widow, Sarah Sanders, who conveyed said land to the defendant in error, and his children, who are the plaintiffs in error. On the 16th day of Novem-

ber, 1900, the United States Court for the Western District of the Indian Territory, acting in probate, set aside and vested said lot in the widow under the provisions of the Arkansas law extended in force in the Indian Territory. Said Arkansas law found at Section 3, Chapter 1, of Mansfield's Digest, is as follows:

> "When any one shall die leaving a widow or children and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order that the estate vest absolutely in the widow or children, as the case may be, and in all cases where the estate does not exceed eight hundred dollars the widow or children, as the case may be, shall be entitled to retain the amount of three hundred dollars of the property at cash price."

The property having been awarded the widow under the foregoing section, there was nothing involved in the state court except the mere application of the local law and practice. For authorities see number one of brief for defendant in error.

*Wherefore,* the defendant in error prays for the dismissal of the writ of error herein.

Respectfully submitted,

JOSEPH C. STONE,
*Attorney for Defendant in Error.*

*In the*
SUPREME COURT OF THE UNITED STATES.
*October Term, 1914.*

No. 277

PATSEY PERRYMAN *et al.*, - - *Plaintiffs in Error,*

*vs.*

PEGGY WOODWARD, - - - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

## BRIEF *on* MOTION *to* DISMISS.

The defendant in error has filed a motion to dismiss the appeal taken in this cause upon three grounds; each of these grounds is, in fact, covered by the general statement that no federal question is involved. Counsel's error occurs in his failure to properly understand the question which we have presented in our original brief. It is not a question as to the proper construction of section 3 of Art. 1 of Mansfield's Digest and therefore, a mere question

of the construction to be given the Arkansas statute, but the question is whether or not section 3 was, by the Act of Congress, extended over the Indian Territory and whether the subsequent Acts of Congress did not repeal such section, even though originally extended over the Indian Territory. It is not, as counsel suggests, a question as to who is entitled to the property in controversy by reason of section 3 of this act, but who is entitled to the property under and by virtue of certain Acts of Congress. If section 31 of the Act of Congress of May 2, 1890, extended section 3 in the form in which it appears in the Mansfield's Digest, over the Indian Territory, then the rights of the parties are clear and there could exist no controversy. If section 3 of Mansfield's Digest was extended over the Indian Territory, the property goes to the defendant in error unless later Acts of Congress are inconsistent therewith. While, upon the other hand, if section 3 was not extended over the Indian Territory by the Act of Congress of May 2, 1890, or if extended but repealed by subsequent Acts of Congress, then the plaintiff would take the property. It is, therefore, a clear-cut question of the proper construction to be given to the Act of May 2, 1890, in the first instance, followed by whether or not later Acts of Congress were inconsistent with this section and would repeal the same, if originally extended over the Indian Territory. In either case, these are federal questions.

So for defendant's brief, three questions are clearly overlooked. If the Act of May 2, 1890, extended over the Indian Territory the provisions of Mansfield's Digest, so far only as same were in force in Arkansas, and section 2 of Art. 7, of Mansfield's Digest was not in force in Arkansas, so as to give the title to a homestead, it, when extended, should be given the same effect and would not pass any title to the homestead of the deceased applicant. This seems to us an obvious proposition. It would be given the same effect in the Indian Territory that it had been given in Arkansas. It is immaterial whether it was repealed or amended by the Legislature in Arkansas or by the Constitutional Convention, because it was not in force in that state and, therefore, not extended over the Indian Territory. This is certainly a federal question. The question is whether the Act of Congress of May 2, 1890, extended only the laws in force in Arkansas at which it extended the Mansfield's Digest, whether same was in force in Arkansas or not. There is no construction of the Arkansas law. The Supreme Court of the state in its decision on the petition for rehearing, admitted that section 2 was not in force in Arkansas so far as the homestead was concerned, but held that the Act of Congress of May 2, 1890, extended the provisions of Mansfield's Digest over the Indian Territory, without regard to whether same were in force in Arkansas or not.

This clearly presents the question of the proper construction of the Act of Congress of May 2, 1890, and is, therefore, a clear-cut federal question.

In the case of *Chapple* v. *Gidney*, 38 Okla. 596, which was the authority of the Oklahoma Commission for affirming this case, the court in the 2nd subdivision of the syllabus, says:

> "By the Act of May 2, 1890, c. 182, 26 St. at L. 81, Congress intended to extend over and put in force in the Indian Territory all of the provisions that are found in the several chapters of Mansf. Dig. which are designated in section 31 of the Act of Congress by subject and chapter number, if not locally inapplicable or in conflict with the Act of Congress of May 2, 1890, or with any law of Congress relating to the subjects specially mentioned in said section. Congress did not intend to make the extension or non-extension of such law to depend upon the question whether they were in force in the state from which they were adopted."

This is an unequivocal construction of the Act of Congress. It must be borne in mind that the decision in *Chapple* v. *Gidney, supra,* was rendered after the original decision in this case but subsequent to the decision on petition for rehearing and is, therefore, not a rule of property.

On the next question raised, that section 3 of article 1 of the Mansfield's Digest was in conflict with Sec. 5 of Act of Congress of April 26, 1906 (34

Stat. L. 137), the lower court expressly passed. The court said:

> "It is argued that under this section the patent from the Principal Chief vested the title in the heirs. This argument is not tenable. Section 5, Act April 26, 1906, was passed several years after the Original Creek Treaty was made, and Sec. 5 of said act was intended to apply only to allotments. Allotments could not be sold prior to their selection, but there was no such prohibition with reference to the sale of town lots. They could be sold at any time, and thousands of titles in the towns on the Indian Territory side of the state would be rendered defective if it should be decided that a patent from the Principal Chief of the tribe conveyed the land to the heirs, notwithstanding they or the owner of the lot may have sold it prior to the execution of the patent."

This plainly says that said section five was not applicable to town property because town property was alienable by the applicant. But section five expressly covered such a condition in the following language:

> "And in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns."

There were no assigns of the applicant, so it necessarily passed to his heirs. But the court said that this section was not applicable because it did not provide for the passage of the title in case of a conveyance and copied the act to the very point where it

did so provide. But as shown in our supplemental brief, section 32 of the Act of June 25, 1910 (36 Stat. L. 855), was passed for the sole purpose of providing for a devolution of the title to townsites where the applicant had died prior to the issuance of patents.

Section 32 provides:

> "Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died or who hereafter dies before the approval of such deed, the title to the lands designated therein shall inure to and become vested in the heirs, devisees, or assigns, of such deceased grantee as if the deed had issued to the deceased grantee during life."

This section was drafted and passed to meet the very situation presented in this case and for no other purpose.

It provides that this title should inure to the heirs or assigns of deceased patentees when patents were issued under any treaty. This section was required in the Choctaw and Chickasaw Nations because the treaties did not provide that the titles to town lots should be acquired in like manner and with like effect as titles were obtained to allotments as did section 23 of the Creek Treaty (Act Mar. 1st, 1900, c. 676, 31 Stat. at L. 868). But if section 23 of the Creek Treaty was inapplicable there existed no provision for devolution of title to townsites when

the applicant died prior to patent, until the Act of June 25, 1910. The later act is clear and its purpose unmistakably disclosed by its origin and history.

Upon this question the Supreme Court decided against applicants or plaintiffs in error. Is not this too clearly a federal question to justify further imposition on the patience of the court?

We, therefore, insist upon reversal of the judgment and the overruling of the motion to dismiss.

B. B. Blakeney,
James H. Maxey,
*Attorneys for Plaintiffs in Error.*

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*In the*

**SUPREME COURT OF THE UNITED STATES.**

***October Term, 1914.***

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**No. 277.**

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**PATSY PERRYMAN, CLORY GROSS, ISAAC SAUNDERS, et al., - - - *Plaintiffs in Error,***

***vs.***

**PEGGY WOODWARD, - - *Defendant in Error.***

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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# BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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## Abstract of Record.

This action was commenced by the plaintiffs in error, in the District Court for the Western District of the Indian Territory on the 19th day of September, 1906, against Peggy Woodward, defendant in error. The plaintiffs in the said court being the plaintiffs in error in this court, filed their complaint in equity alleging that they were the children of Squire Saunders, deceased, who de-

parted this life at Muskogee the 22nd day of October, 1900, intestate, and left surviving him as his sole heirs at law, his children the plaintiffs; and that at the time of his death the said Squire Saunders was the owner in fee simple of Lot Ten (10) in Block 248 in the City of Muskogee, which he had purchased from the Creek Nation in conformity with law, and a copy of the deed or patent was attached to the complaint and marked Exhibit "A" and made a part thereof; and alleging further that each of the said plaintiffs was the owner of an undivided one-sixth interest in said property, and that the same could not be partitioned without great prejudice, and that Peggy Woodward, the defendant, held possession of the said lot, claiming some right and interest therein, the nature of which was to the plaintiffs unknown; and had collected rents in the aggregate sum of $300.00, but that she had no legal right to or interest in said premises, but she was holding the same unlawfully and against the will of the plaintiffs, the legal owners thereof, and then was and had been for several years, appropriating to her own use the income from said property, and stating further that the plaintiffs had no relief at law, prayed that it be adjudged and decreed by the court, that Squire Saunders was, in his lifetime, the owner in fee simple of said lot, and that he departed this life intestate on the 22nd day of October, 1900; and that he left the plaintiffs as his sole and surviving heirs at law, and that the de-

fendant be decreed to bring into court the rents and profits; and title to said property be vested in the plaintiffs and partitioned, and for such other relief as right and justice require. This complaint will be found at pages 11, 12 and 13 of the record.

Process having duly issued, the defendant came into court and filed her answer, admitting that the plaintiffs were the heirs of Squire Saunders, but denies that Squire Saunders was the owner in fee simple of the property, and denied that Squire Saunders at the time of his death had any interest in the lot. And further alleges she was the rightful owner of the lot, and that Squire Saunders, his heirs at law, the plaintiffs herein, or no other person but the defendant is the rightful and legal owner of the said lot, and praying for general relief. This answer is found on page 16 of the record.

The matter came on for hearing before the Master in Chancery, who took the evidence and reported his findings of fact as follows (See Record page 18):

> "From the testimony of said witnesses, the documentary evidence introduced, and the pleadings filed herein, I find the facts in this case to be as follows:
>
> *1.* That the plaintiffs herein are the children of Squire Saunders, deceased, who died intestate on the 22nd day of October, 1900.
>
> *2.* That the said Squire Saunders left him surviving as his children, Patsy Per-

ryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, and William Saunders, and Sarah Saunders, his wife.

*3.* That the said Squire Saunders at the time of his death was the owner of Lot 10 in Block 248 in the town of Muskogee, Creek Nation, Indian Territory.

*4.* That the defendant purchased from Sarah Saunders, the widow of said Squire Saunders, deceased, the premises hereinabove described.

*5.* That the said widow's interest in and to said premises was purely that of dower.

I am, therefore of the opinion and conclude that the title to the premises known as Lot 10 in Block 248 is in the plaintiffs and that they each have an undivided one-sixth interest therein, subject to the dower of said Sarah Saunders, wife of said Squire Saunders, deceased."

The Master in Chancery also reported the evidence taken, which evidence commences at page 19 and continues to page 38 of the record, inclusive.

Patsy Perryman being first called, testified that she was one of the children of Squire Saunders, and that her father died about the 22nd day of October, 1900. And he had left no will. And that there was living at the time of the death of her father, the following children, to-wit: Patsy Perryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders and William Saunders, and they were all sons and daughters of Squire Saunders. (See record,

pages 19 and 20.) That at the time of her father's death, he was living with his wife Sarah Woodward, on Lot 10, in Block 248, in Muskogee, the lot in controversy. That after her father's death that the Chief of the Creek Nation delivered to her a deed to this property, which deed was marked as plaintiff's exhibit A and introduced in evidence, and is found copied at length on page 14 of the record.

Isaac Saunders was next called as a witness, and his evidence commences at page 23 of the record. He testified that he is the son of Squire Saunders, deceased. At page 24 he testifies that his father had lived in the property in controversy about one year prior to his death and claimed to be the owner of the improvements on the lot. At page 25 he testified in detail that all of the plaintiffs were children of the deceased, and that at the time of his father's death he was living with Sarah Saunders as his wife.

Andrew Caston testified to substantially the same facts, and further testified that the rental value of the property was about $5.00 per month.

After the testimony of Judge Thomas that the Principal Chief of the Creek Nation had delivered to him a deed, as attorney for Patsy Perryman, the plaintiffs rested.

The defendant Peggy Woodward took the stand, and testified, commencing at page 30 of the record, that Sarah Saunders, the wife of the de-

ceased Squire Saunders, was her daughter, and that Sarah Saunders, her daughter, was in possession of the premises continuously after the death of her husband Squire Saunders; that she, Peggy, had paid certain of the funeral expenses and had received the possession of the property from her daughter Sarah Saunders, *in re* payment of such expenditures. That she had taken possession of the premises a month or two after the death of Squire Saunders and had proceeded to rent it and to pay out the payment required by the Treaty of the Creek Indians. She testified at page 32 of the record, that the property had been scheduled in the name of Squire Saunders; she then testified that he had paid all of the taxes.

On cross examination, commencing at page 33 of the record, she further testified that she had rented the property for $4.00 per month. The evidence was then closed, except the introduction of a certified copy of an order of court. This certified copy is found on page 34 of the record, and is as follows:

> *"In the United States—for the Northern District of the Indian Territory, Sitting at Muskogee. In re Administration of the Estate of Squire Saunders, Deceased. Sarah Saunders, Widow. Probate No. 454.*
>
> ORDER OF COURT.
>
> Now on this 16th day of November A. D. 1900, the same being one of the regular judicial days of the Sept. Term, the above styled cause

came on for hearing upon the report of Z. T. Walrond, Probate Commissioner, and the Court being advised in the premises finds that said report should be sustained.

Whereupon, it is considered, ordered and adjudged by the Court that it appearing that the estate of said deceased does not exceed three hundred dollars, the said estate do vest absolutely in Sarah Sanders, the widow of said Squire Sanders, deceased.

It is further ordered that the improvements on Lot 10 of Block 248 of the townsite in Muskogee, and the horse, saddle and bridle, and the other personal property described in the petition of the said widow are declared to be the property of the said widow, and that there be no administration granted upon the estate of the said decedent. The costs of this proceeding, including an allowance of $5 made to the Probate Commissioner are taxed against the said Sarah Sanders.

Approved.

(Seal) JOHN R. THOMAS, *Judge.*"

The Referee having recommended judgment in favor of the plaintiffs, and for a partitioning of the property, the defendant filed exceptions to this report, which exceptions are found on page 39 of the record, and are as follows:

"*(1)* That the legal conclusions of said Master in Chancery are unsupported by the evidence submitted in this case.

*(2)* That the legal conclusions of said Master in Chancery are unsupported by and wholly inconsistent with the law governing this

case. That findings in fact numbered 3, 4, 5 are inconsistent with the testimony and wholly contrary to law.

*(3)* That said Master in Chancery committed gross error, wholly inconsistent with equity and justice and grossly prejudicial to defendant's rights when he refused to admit in evidence when properly offered, a certain document, to-wit, an order of Court made by the Judge of the U. S. Court for the Northern District of the Indian Territory, which order in substance showed that the personal estate of one Squire Saunders, (said estate claimed to be identical with the subject matter of this cause) had been vested in one Sarah Saunders."

The matter came on for hearing before the court, and the court sustained the exceptions and made the following findings of fact, to-wit:

"This cause coming on to be heard on the exceptions to the Master's report, this 30th day of July, 1909, a judicial day of the May term of said Court, and all parties being present in person and by attorney; and the Court having the evidence of the witnesses that were introduced before the Master, duly sworn and examined, and having heard argument of counsel and being fully advised in the premises finds the following state of facts:

*(1)*

That the plaintiffs herein are the children of Squire Saunders, deceased, who died on the 22nd day of October, 1900.

*(2)*

That the said Squire Saunders, at his death left surviving him as his children, Patsy Per-

ryman, Clory Gross, Isaac Saunders, Fred Saunders, Sam Saunders, William Saunders, and Sarah Saunders, his wife.

*(3)*

That the said Squire Saunders died intestate.

*(4)*

That the said Squire Saunders left no minor children at his death.

*(5)*

That the said Squire Saunders, at the time of his death, owned the possessory right, and occupied the following described property, to-wit: Lot 10, block 248, in the town of Muskogee, Creek Nation, Indian Territory, being the property in controversy and that a deed to same was issued to him January 24th, 1904.

*(6)*

That on the 16th day of November, 1900, the United States Court for the Northern Distrist, of the Indian Territory, Hon. JOHN R. THOMAS, Judge, sitting at Muskogee, in said district, in probate in case styled *'In re. Administration of the Estate of Squire Saunders, deceased, Sarah Saunders, widow,* and numbered 454,' finding that the estate of the deceased Squire Saunders, was of less value than $300.00, entered a decree of said court vesting the estate absolutely in Sarah Saunders, the widow of the deceased Squire Saunders.

*(7)*

That the defendant Peggy Woodward, purchased from Sarah Saunders, the widow of the said Squire Saunders, deceased, in 1900, the following described property, to-wit: Lot 10, block

248, in the town of Muskogee, Creek Nation, Indian Territory, the property in controversy; that possession of said property was delivered to the defendant Peggy Woodward.

*(8)*

That the defendant Peggy Woodward, has been in the uninterrupted possession of the above described property, was in the possession at the time this suit was filed and is now, and has been since the year 1900, and has paid all appraisements and a part of the taxes.

*(9)*

That there is no equity in the plaintiffs' petition.

It is therefore ordered, adjudged and decreed by the court that plaintiffs take nothing by this suit, and that the defendant Peggy Woodward, is the owner and in possession of the property in controversy herein, to-wit: Lot (10) ten, in block (248) two hundred forty-eight according to the original plat of the town of Muskogee, formerly Indian Territory, and was the owner and in possession thereof at the time this suit was filed.

That the title of the defendant Peggy Woodward, is clear and free from any cloud or incumbrance and that defendant have and recover of and from the plaintiffs, all of her costs in and about this suit laid out and expended and that execution may issue therefor, to all of which the plaintiffs except.

JOHN H. KING,

*Judge of the District Court, Third Judicial District, Muskogee County, State of Oklahoma."*

The court entered judgment on its findings, reversing the master in chancery and adjudging that the defendant Peggy Woodward was the owner of the land in controversy. In the trial court, within time, a motion for a new trial was filed and duly considered and overruled, and the case was appealed to the Supreme Court of the state.

This cause coming on for hearing in the Supreme Court of the state, was affirmed. The opinion affirming was rendered by Commissioner BREWER, found on page 57 of the record.

The petition for rehearing having been duly filed in the Supreme Court, came on for hearing, and upon reconsideration the court still affirmed the case, but in an opinion filed by Commissioner ROSSER (found on page 68 of the record), the theory of the affirmance is found clearly expressed in the syllabus of the court, and an exception has been taken to each of the propositions that appear in the three paragraphs of the syllabus. The assignments of error are directed toward the errors of the court in each of these three paragraphs.

The third and fourth assignments of error take exception to the statement of law found in the third paragraph of the syllabus, which is as follows:

> "Sec. 3 of Chap. 1, of Mans. Dig., of the Stats. of Ark., was not locally inapplicable and was extended over and put in force in the In-

dian Territory by the Act of Congress of May 2, 1890 (23 Stat. L. 81), although repugnant to the Constitution of Arkansas so far as it affected homesteads; and an order of the probate court vesting the entire estate of a deceased person in the widow of the deceased, was valid and effective where the entire estate did not exceed three hundred dollars in value, though a portion of the estate consisted of improvements on a town lot occupied as a home."

The sixth assignment of error takes exception to the statements of law found in the second paragraph of the syllabus, which is as follows:

"Where a town lot in the Creek tribe was scheduled to the owner of the improvements and after his death was sold by the person in whom the law vested the improvements, and the payments due the tribe were paid by such purchaser, the patent from the tribe in the name of the deceased owner of the improvements inured to and carried title to such purchaser."

The fifth assignment of error takes exception to the principle of law stated by the Supreme Court in the first paragraph of the syllabus, which is as follows:

"Under the law in force in the Indian Territory prior to statehood, where a copy of a judgment was offered in evidence before a master in chancery, excluded by him and exceptions saved by the party offering it, it was not error for the court, upon sustaining the exceptions to the report of the master, to consider

the judgment so offered without re-referring the case to the master, where the judgment was copied into the report of the master and was properly admissible in evidence."

The first and second assignments of error are directed to the whole of the decision of the Supreme Court of the state.

## ARGUMENT *and* AUTHORITIES.

The plaintiffs in error insist that there is error in each of the three propositions stated in the syllabus of the decision by the Supreme Court of the state, for which this case ought to be reversed; and because of error in the proposition of law stated in the second and third paragraphs of the syllabus, the judgment ought to be entered in this court for the plaintiffs in error. As shown in the abstract of record, the property in controversy was a part of the original townsite of Muskogee, and one Squire Saunders made due and proper application for title to this property; and after same was scheduled to him died, having lived at least upon the property for more than one year prior to his death, with his wife Sarah Saunders.

That after his death an order was made by the United States District Court in probate, attempting to set apart this property to his widow, Sarah Saunders, and the widow gave or sold the property in controversy, by delivering possession of the same to her mother, the defendant in this case.

At least two important federal questions are involved in this case.

*First.* The constructions of the treaties of the Creek Nation with reference to the patenting of town property, and the Acts of Congress in connection therewith, *and*

*Second.* The proper construction of section 31 of an Act of Congress approved May 2, 1890, c. 182, 26 Stat. at L. 81.

In addition to the two federal questions stated, we will present a third question in which we think reversible error occurred, and which is based upon the proposition stated in the first paragraph of the syllabus of the opinion by the state Supreme Court. It may be briefly stated as follows:

"When the trial court reverses the order of the master in excluding evidence, it should order the cause re-referred or open the case for admitting such evidence, and affording the adverse party the opportunity of introducing explaining or rebuttal evidence."

## I.

**The construction of the treaties of the Creek Nation with reference to the patenting of town property, and the acts of Congress in connection therewith.**

Section 23 of the Original Creek Treaty (31 Stat. at L. 861), among other things provides:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute

in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge."

No provision was made in the Creek Original Treaty or the Supplemental Treaty for the execution and delivery of deeds to deceased allottees; that is, the persons who had properly filed claims for the property and had same scheduled to them and died before the delivery of the patent. Congress, however, by an Act of April 26, 1906 (34 Stat. at L. 137), in section 5, provides, as follows:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents

heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same."

These two provisions, construed together, provide in effect that the principal chief of the Creek Nation shall execute in due form and deliver to each person a deed, vesting the allottee in case of allotted lands, and the claimant in the case of town lots, the title to the lands or lots to which they were respectively entitled, and that in case of death prior to the sale of the lands, if same were unrestricted, that the deed should still issue in the name of the allottee or claimant, but the title should vest in the heirs of said allottee or his assigns.

Section 15 of the Act of June 28, 1898 (30 Stat. at L. 495), provides:

> "The person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title to such lands or town lots."

These are the sections governing the method and manner of issuing deeds for town property.

A Board of Townsite Commissioners had been appointed, the townsites were surveyed, applica-

tions made with them for deeds, and they made schedule of the property showing the person who was entitled to each respective tract. Appraisements were made and certain payments were required, payable in four installments.

Subsequently the Creek Treaty provided that the principal chief should execute the conveyance, and section 5 of the April 26, 1906 (34 Stat. L. 137), provides how conveyance should be made in case the claimant had died prior to making payment and receiving the patent. There is no question but that lots scheduled to claimants were subject to conveyance without restriction, and therefore the Act of April 26, 1906, provided that the patent should still issue in the name of the allottee, but that title of the property could descend to his heirs or lawful assigns, as if patent or deed had issued to allottee during his life. While section 5 refers only to allotments, section 23 of the Creek Treaty provides that town lots should be conveyed in like manner and with like effect as other conveyances. There was no pretence that Squire Saunders, the claimant, during his lifetime made any conveyance, but it was admitted and found by all of the courts that he died in the actual possession of this land. These acts therefore provide that the deed should be issued in his name, but the title to the same should vest in his heirs, or as stated by section 5 of the Act of April 26, 1906, "The title to the land described therein shall inure to and vest in his heirs."

It is equally clear from the evidence, and was also found to be true by all of the courts below, and admitted by the defendant in her answer filed in the case, that these plaintiffs were the heirs.

Therefore it is clear to us that by virtue of these Acts of Congress and the admission in this record that when Squire Saunders died, having scheduled the property, and in the possession of the same, and when the deeds subsequently issued by the principal chief conveyed the land to Squire Saunders, that the title to this land inured to and vested in his heirs, the plaintiffs in this case.

The Supreme Court of the state disposes of this proposition, it seems to us, in a very unsatisfactory method. They said in their opinion:

> "They (town lots) could be sold at any time and thousands of titles in the towns of the Indian Territory side of the state would be defective, if it should be decided that a patent from the principal chief of the tribes conveyed the lands to the heirs, notwithstanding they, or the owners of the lots, may have sold prior to the execution of the patent."

The Act of Congress provides especially for this contingency by the following clause, in section 5 of the said Act; "And in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns," and making this applicable to town lots, in effect provides, that in case any claimant should die

after the restrictions have been removed his property shall descend to his heirs or lawful assigns.

Therefore the Supreme Court of the state was unnecessarily alarmed when it stated that thousands of titles in towns on the Indian Territory side of the state would be rendered defective if this Act of Congress was applied or properly construed. But it must not be overlooked, that in the case at bar, that Squire Saunders never made any assignment of his interest, and that title in this case had to inure to his heirs because there were no assigns.

The Supreme Court of the state continued its discussion of the principles involved by stating that section 642 of the Mansfield Digest (which was only declaratory of common law) applied and the patent inured to the benefit of the grantee of the patentee. No question but what that is true, and the Act of Congress so provides, but there was no grantee of the patentee in this case, but the patentee died claiming the property in controversy, and the rights of both parties are based upon the fact that his estate became vested with his title. The widow claims that because the estate is less than $300.00 that she took it all, thereby admitting the estate was vested with the title to his property. The heirs claiming that they inherited the estate and they therefore take title. Then section 642 of Mansfield's Digest, or the common law principles, that an after-acquired title inures to the benefit of the grantee, has no application in this case, because there was no conveyance

of this property by the patentee or claimant during his lifetime, and his after-acquired title could not vest in any grantee.

We therefore return to the original proposition of whether or not this Act of Congress carrying out the provisions and terms of the Creek Agreement, which provided that the principal chief should make conveyance of town lots in like manner and with like effect, as conveyances were made of allotted lands, in its provision that such patent should issue in the name of the deceased allottee, but title should vest in the heirs of such allottee, applied and controlled the method of issuing patents to town lots. No other method has been provided by Congress for the conveyance of town property in case of the death of the allottee. It is however such a universal policy of the government of the United States to cause all patents to claimants for public lands or allotted lands, to be issued in the name of the original claimant, and the original allottee, followed by a provision of law fixing in whom said title should vest, that but little difficulty ought to be had in applying these provisions to town lots. And nothing could be plainer than that section of the Creek Treaty which provides that in like manner and with like effect deeds shall be issued to town property by the principal chief. The reference to like manner and like effect follows the provision of the treaty which provides the manner and method of issuing deeds to allotted lands, and the effect that should be given to said conveyances. Then the pro-

vision with reference to conveyance of the town property, adopting the same method and giving to such conveyance the same legal effect that had been adopted with reference to the lands allotted, conclusively establishes the rights of the heirs to the unconveyed town lots held by their ancestor at the time of his death.

In this view of the law, it will not be necessary to discuss the other principles adopted by the court. The Act of Congress would be controlling and its provisions with reference to whom title should descend when the government conveyed title to the claimant would supersede all local and other provisions. It would also control any case of conflict with other Acts of Congress, because this being a special act, referring to a special method of passing titles, would govern any general regulation or provision relating to inheritance.

Assistance may be obtained in determining the proper construction to be given to section 23 of the Creek Treaty, by noticing the location of this section. In this treaty it will be observed that section 1 defines some general terms used in the treaty; then sections 2 to 9, inclusive, provide the method of the allotment of agriculture lands; then sections 10 to 17, inclusive, provide the method of the distribution of the town sites; sections 18 to 22, inclusive, follow with the method of disposing of cemeteries, public buildings, orphanages, and church property, and section 22, the method of surveying certain

property. Then following each of these provisions, under the subdivision of titles is section 23, which is intended to, and necessarily does, apply to the conveyance of the allotted lands and town lots in the Creek Nation. Not only would its location indicate it follows these provisions, and therefore necessarily referred to them, but the section itself says it refers to the above by providing:

*First*, the conveyance of allotted lands; and,

*Secondly*, the conveyance of town lots.

It is true that in the conveyance of town lots it merely adopts the method and manner and effect of deeds made to allotments. It is also a general maxim of law that any subsequent change in the method of conveyance of allotted lands would likewise change the method of town lots, unless an act affecting the change in allotted lands, by its terms showed it was inapplicable to town property. But in the case at bar there existed as much necessity in providing some method investing title to town property in case of the death of the claimant, as there did in the case of the death of the allottee. Therefore the statute construed harmoniously and as a whole provides that conveyance made either of town lots or of allotted lands, after the death of the allottee or claimant, should vest in the heirs of said claimant or allottee; or in case of sale of unrestricted lands, such as town lots, should inure to the benefit of the assigns of claimant, if same had been conveyed.

The conveyance in this case is found on pages 14 and 15 of the record, and it will be noted that it expressly states it is issued pursuant to the Creek Agreement. The Creek Agreement was approved by Congress March 1, 1901 (31 Stat. L. 861), and ratified by the Creek Nation May 25, 1901. The deed recites:

> "*Whereas,* a townsite commission, heretofore appointed and acting under authority of the Act of Congress approved March 1, 1901 (31 Stat. 861), agreement ratified by the Creek Nation, May 25, 1901, has appraised the lots in the town of Muskogee, Muskogee (Creek) Nation, Indian Territory. * * *
>
> *Now, therefore,* I, the undersigned, The Principal Chief of the Muskogee (Creek) Nation, do, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, hereby grant, sell, and convey unto the said Squire Saunders, heirs and assigns forever, all the right, title and interest of the Muskogee (Creek) Nation, aforesaid, in and to lot numbered 10 in block numbered 248 in the town of Muskogee, Muskogee (Creek) Nation, Indian Territory, and according to the plat thereof on file as aforesaid.
>
> *In witness whereof,* I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said nation to be affixed at the date hereinafter shown.
>
> Date January 26, 1904.
>
> P. Porter,
>
> *Principal Chief of the Muskokee (Creek) Nation.*"

Therefore it is obvious that this conveyance was made to Squire Saunders after his death, pursuant to an Act of Congress, April 26, 1906, which provided that patents should issue in the name of the original claimant, but should inure to the benefit of his heirs or assigns in case of lands unrestricted. The lots being unrestricted would pass to his heirs or assigns, by virtue of the Act of Congress; there being no assignment during his lifetime, it necessarily passed to his heirs.

The Supreme Court of the state therefore had no necessity of being alarmed at this construction being given to the act, because it is the very construction which they have given it, except they overlooked the fact there was no assignment by Squire Saunders during his lifetime of this property.

As suggested by the state Supreme Court, if conveyance had been made by the original claimant, the patent would then issue in his name, but the title would vest in the grantee's ~~name~~ assign; upon the other hand, if there was no conveyance, it would pass to and vest in the heirs. In neither event would the land be subject to the probate laws of the state, because of Congress having expressly provided in whom the title should vest in case of the death of the claimant.

This rule has been often applied in Indian matters. This court held in the case of *Hy-yu-tse-milkiu* v. *Smith*, 194 U. S. 401, and the case of *McKay* v. *Kalyton*, 204 U. S. 458, that Congress had and

retained the exclusive control of Indian lands, and the manner and method of vesting title in the heirs.

In the case of *Bond* v. *United States,* 181 Fed. 613, the Circuit Court of the State of Oregon discussed and applied the principles stated in these last two cases, and concluding that the United States had the right to determine the heirs of the deceased allottee, and dispose of all questions of such heirship, and issue patent to the person which its department determined was the proper heir. This construction was applied notwithstanding the provision of the general allotment act which provided that land should descend to the heirs of the allottee according to the laws of the state or territory in which such Indian resided.

In the case of *Parr* v. *United States,* 153 Fed. 462, the same principle was applied, and the court held that state courts had no jurisdiction to determine even the heirs, and the matter was left entirely with the United States.

The probate laws put in force in the Indian Territory by the Act of Congress extended over the territory, the law referring to wills and devises, but it probably will not be contended that the lands that were held by the Government of the United States or Creek Nation were subject to devise, except as provided by the different treaties.

We therefore think it must be clear that under the several provisions of the Act of Congress and of the treaties of the Creek Indians, referred to, the

conveyance to Squire Saunders vested in his heirs and in his heirs alone, the title to the land in controversy.

The record discloses in this case that Squire Saunders died on the 22nd day of October, 1900. At that time the Original Creek Treaty was not in force, having been approved March 1, 1901, and ratified by the Creek Nation later, and there were no provisions of law for issuing patents to deceased claimants.

The Act of May 31, 1900 (31 Stat. L. 221), provides for the surveying, platting, assessing and disposition of town lots in the Indian Territory, and this act was re-adopted by the Original Creek Treaty, and deed in this case was issued under the provision of the Creek Treaty.

It will be noted that section 28 provided that all citizens who were living on the 1st day of April, 1899, entitled to be enrolled, etc., should be placed upon such rolls, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of land, and distributive share of all the funds of the tribe, the lands and the money to which he would be entitled if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation.

In the case of *deGraffenreid* v. *Iowa Land and Trust Company*, 20 Okla. 687, it was held, in effect, that this provision of the Creek Treaty superseded the laws of Arkansas put in force in the Indian

Territory, with reference to descent and distribution. The court in this last case used the following pertinent language:

> "The scheme was a complete provision for the devolution of real property taken or to be taken in allotment under the terms of this agreement, and therefore repealed chapter 49 of Mansfield's Digest, if the same was ever in force in the Creek Nation; but on this we express no opinion."

We think, of course, that the Arkansas laws were never in force, with reference to Creek lands until title passed from the Creek Nation, and it is clear that if the Act of 1901 repealed Mansfield's Digest with reference to the allotments, it also repealed Mansfield's Digest with reference to town lots, until the patent was issued, because the Act of Congress provided, as well as the Original Creek Treaty, that the deed should be issued in the same manner and have the same effect as the deed to an allotment. If a deed issued to an allotment in the name of the deceased, it vested the estate in his heirs according to the Creek laws, and a deed to a town lot having the same effect, would vest it in his heirs under the same law. We think the rule is so obvious that it needs no extended discussion.

In the recent case of the *Iowa Land and Trust Company et al.* v. *United States of America et al.*, decided at the May term, 1914, in action No. 4001, the United States Circuit Court of Appeals for the Eighth Circuit decided expressly that the provision

of section 5 of the Act of Congress April 26, 1906 (34 Stat. L. 137), as well as section 22 of the Act of Congress of June 25, 1910 (36 Stat. L. 855), provided for the passage of title when the selection had been made by the Indian during his lifetime, but also held that if the Indian had not made the selection during his lifetime, under these Acts of Congress, the patent could not be made to the deceased claimant, and if a conveyance was so made, that no title passed.

Therefore we have this clear situation that no title would have passed by the patent introduced in this case, unless such a patent was authorized and directed by these Acts of Congress and there would be no method by which a conveyance or legal title could be obtained. But for fifteen years the Department and the public have continued to issue and perfect titles under this Creek Treaty, and under these later provisions of the Act of Congress, and important cities have been builded upon the security of such titles.

## II.

**The proper construction of Section 31 of an Act of Congress approved May 2nd, 1890, c. 182 (26 Stat. at L. 81).**

The next proposition is the Assignment No. 3, which is directed toward the third subdivision of the syllabus of the opinion rendered by the Supreme

Court of the state. Section 31, of the Act of Congress of May 2, 1890 (23 Stat. L. 81), provides so far as is material to this controversy, as follows:

> "That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that state of eighteen hundred and eighty-three, as published in eight-hundred and eighty-four, in the volume known as Mansfield's Digest of the Stautes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to administration, chapter one, and the United States Court in the Indian Territory herein referred to shall have and exercise the powers of courts of probate under said laws."

This Act of Congress extended certain general laws of the State of Arkansas in force at the close of the session of the general assembly. The words *in force* as used here, can be given but one reasonable construction and that is that the general laws in force in Arkansas at the time stated, were extended over and put in force in the Indian Territory. There was an obvious purpose in this statute. The Indian Territory bordering upon the western boundary line of Arkansas had been settled largely by white citizens who had immigrated from that state. And Congress deemed it wise and proper in extending certain laws over these people, to extend

the laws with which they had some familiarity. At the same session of Congress certain townsite laws were extended over the Territory of Oklahoma, which territory was lying immediately south of Kansas and settled largely by people from Kansas, so by the Act of May 14, 1890, Congress extended townsite laws of Kansas over Oklahoma Territory.

Section 11 of the Act of May 2, 1890, also extended over the western part of the state, certain laws in force in the State of Nebraska. And during the period these laws were in force in the Territory of Oklahoma, it was never contended that any of them which had been declared invalid and not in force in Nebraska, were in force in Oklahoma.

Section 3 of chapter 1, Mansfield's Digest, provides:

> "When any one shall die leaving a widow or children, and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order that the estate vest absolutely in the widow or children, as the case may be; and in all cases when the estate does not exceed eight hundred dollars the widow or children, as the case may be, shall be entitled to retain the amount of three hundred dollars of the property at cash price."

This section was passed by the Legislature in 1853 of the State of Arkansas and continued in force up until the adoption of the constitution of the state in 1874. The constitution of the state provided

other methods for the disposition of the homestead of a family, and gave its use to the widow during the time she occupied the homestead, but upon her abandonment of it, either by leaving it, or an attempted alienation of it, destroyed her rights and passed the property to the heirs.

In the case of *Winters* v. *Davis*, 51 Ark. 335, the court said:

> "The effect of the constitution upon the rights of the parties in this case, the widow having no separate homestead in her own right, and her husband having left minor children, was to give her one-half of the homestead, and of the rents and profits thereof, for her natural life, and the other half to the minor children till each of them arrives at 21 years of age; each child's right ceasing as he or she reaches the age of 21, and going to the younger children until they all become 21 years old, when the entire homestead, and the rents and profits vest in the widow during her life or until she abandons it."

In the case of *McAndrews* v. *Hollingsworth*, 72 Ark. 446, it is held that the legal title of the estate is not by the constitutional provisions, vested in the widow, but only the right of occupancy, and that the legal title, at her death, or when she abandons it, again vests in the estate, and may be distributed to the heirs or appropriated by the creditors of the deceased. This case, we think, is conclusive of the question in the case at bar. The widow there, had attempted to dispose of the estate,

and the court permitted the creditors of the deceased to seize the homestead.

In the case of *Griffin* v. *Dunn*, 79 Ark. 408, the Supreme Court applied the same rule, and held that an attempted alienation by the widow operated as an abandonment of the homestead claim, and that the heirs, though adult, could then maintain an action to recover the land. This last case is similar to the one at bar, and the court said:

> "R. P. Posey owned and occupied as his homestead a quarter section of land in Johnson County, and died in August, 1876, leaving surviving him his widow, Sarah Posey, and daughter, Martha R. Dunn, who was then an adult married woman. Her coverture continues to the present time. The tract of land was by an order of the probate court set apart to the widow as her homestead, but in June, 1878, the entire tract was sold, subject to the homestead right of the widow, by the administrator of the estate of said decedent, for the purpose of raising funds to pay the debts of the estate, and was purchased by F. R. McKinnon. The sale was ordered and confirmed by the probate court. In November, 1878, McKinnon and Mrs. Posey, the widow, presumably acting under the belief that the sale made by the administrator subject to the homestead right of the widow was valid, and that McKinnon had obtained title to the land subject only to the widow's homestead right, exchanged conveyances whereby McKinnon conveyed to the widow the west half of the tract and she conveyed to him the east half. Appellants hold the said east half containing 80 acres under mesne conveyance from McKinnon. The widow died in July, 1901, and in

> September, 1903, appellee, Martha R. Dunn, and R. O. Herbert, her grantee of an undivided interest, brought ejectment to recover posession of the land. * * * The sale of the homestead by the administrator was void because the court had no jurisdiction to order it. (Cases cited.) The Statute of Limitations does not run against a cause of action in favor of the heirs for recovery of the homestead during occupancy by the widow, but an attempt by her to alienate the homestead is ineffectual and operates as an abandonment of the homestead claim. In the event of such abandonment the right of action of the heirs becomes complete and the Statute of Limitations begins to run against them."

The case of the *Cherokee Construction Company* v. *Harris,* 122 S. W. 485 (Ark.), would we think, establish our contention in this case. The court, in the syllabus said:

> "Const., art. 9, sec. 6, vesting the rents and profits of the homestead on the death of the owner in the widow for life and children during minority, etc., secured to the widow and minor children a home during the life of the widow and the minority of the children, but it does not create any estate greater than that of occupancy and the right to the enjoyment of the rents and profits, and, as affecting the rights of the adult heirs, the homestead estate is one for life or for years, and the widow and minor children may not, as against the adult heirs or their grantee commit waste by opening on the land new mines, and mine and sell mineral therefrom, or lease the same to others for that purpose."

And in the opinion, it is said; after quoting from Sec. 6, Art. 9, of the constitution, as follows:

> "The chief purpose of this constitutional provision was to secure to the widow and minor children a fixed home during the life of the widow or minority of the children. To secure this object, it was made exempt from sale; so that it cannot be sold to pay the decedent's debts, and it cannot be partitioned, either in kind or for sale. (Cases cited.) It protects the occupant in the possession of the land, and holds it together as a place of residence and a home preserved against sale or partition. It cannot be sold or alienated by the widow. By the act of sale she abandons it as a homestead. (Cases cited.) But the homestead law does not create any estate greater or any right more enlarged than that of the occupancy of the land and the right to the enjoyment of the rents and profits therefrom during the life of the widow or minority of the children."

Upon rehearing in the Supreme Court of the state it was held, in the opinion of the court, in the case at bar as follows (see Rec., p. 71):

> "Lastly, it is urged that Sec. 3 of Chap. 1, of Mans. Dig., under which the defendant in this case claims that the order of the court vesting title in her grantor was made, was not in force in Arkansas at the close of the session of the General Assembly of the state of 1883, as published in 1884, in a volume known as Mans. Dig. because it was in conflict with the Constitution of Arkansas with reference to homesteads. It was held in Arkansas, in the case of *Sampson* v. *Harold*, 51 Ark. 429, that where the estate, or a portion of it, was home-

> stead it would not vest in the widow, although it might not exceed $300.00 in value, because the devolution of the homestead was provided for by Sec. 6 of Art. 9 of the Constitution of Arkansas, which provided that the homestead should vest in the widow during her natural life, with remainder to the children."

Thus the question has not only been settled by the Supreme Court of Arkansas, but also settled by the court in this case, that Sec. 3, Chap. 1, of the Mansfield's Digest, was not in force in Arkansas at the close of the session of the General Assembly of that state of 1883.

The court then proceeded to affirm the judgment notwithstanding this conclusion, upon the theory that it was not essential that the law should be in force in Arkansas at all, if such law was contained in the Mansfield's Digest.

In giving this construction to the Act of May 2, 1890, the court was in effect striking from the Act of Congress the words *in force in Arkansas,* which we think is unwarranted by law.

This provision extending law in force existing elsewhere frequently occurs in the constitution adopted by a state at the time it is transformed from a territory. Section 2 of article 27 of the Constitution of the State of Washington provides in very similar language: "That the laws which were in force in the Territory of Washington and not repugnant to the new constitution should continue in force in the state."

In the case of *State* v. *Ellis*, 22 Wash. 129, the Supreme Court of that state had under consideration this section of the constitution. In that case a defendant was convicted of a felony by a jury of eleven men, under the provisions of an act of the Territorial Legislature enacted in 1854. Subsequently, however, to the passage of this act, the Supreme Court of the United States had held in *Thompson* v. *Utah*, 130 U. S. 343, that laws could not be enacted by territories providing for a conviction by less than twelve jurors. This Act of 1854 was therefore invalid. The question arose in *State* v. *Ellis*, of whether or not this act contained in the statutes of the Territory of Washington was extended over that state by the provisions of the constitution extending laws over the state which had been in force in the territory. The court said in the syllabus:

> "Const., Art. 27, 2, providing that laws in force in the Territory of Washington at the time of the adopting of the state constitution, and not repugnant thereto, shall remain in force until repealed, does not operate as a re-enactment of an existing law, but merely operates to continue in force valid existing laws."

A similar provision is found in the Constitution of the State of Oklahoma, section 2, article 25, of the Constitution, which provides: "That all laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to its constitution, etc., shall be

extended to and remain in force in the State of Oklahoma." This provision of the constitution has been frequently considered by the Supreme Court and the Criminal Court of Appeals of Oklahoma, in which it has been held that only the laws of the territory which were in force at the time, and not repugnant to the provisions of the constitution, were extended. *Smythe* v. *Smythe,* 28 Okla. 266; *Frick and Co.* v. *Oates et al.,* 20 Okla. 473; *DeGraff* v. *State,* 2 Okla. Crim. Rep. 519.

In the case of *Sanger* v. *Flow,* 1 C. C. A. 56, 48 Fed. 152, Judge CALDWELL, speaking for the Circuit Court of Appeals for the Eighth Circuit, used the language: "That the Act of Congress approved May 2, 1890 (26 Stat. c. 182, Sec. 31), adopted and put in force in the Indian Territory the body of the Statutes of the State of Arkansas, as contained in Mansfield's Digest of the laws in that state." But further on in the opinion, the court held that such laws were adopted with the construction placed thereon by the Supreme Court of the state. The court said, "In adopting the Arkansas Statutes for the Indian country, it will be presumed that they were adopted with the construction and interpretation placed upon them by the Supreme Court in that state prior to their adoption by Congress."

In the case of *Zufall* v. *United States,* 1 Ind. Ter. 639, the Court of Appeals of the Indian Territory expressly held that that court was bound by the decisions of the Supreme Court of Arkansas in-

terpreting a statute, if such decision was rendered prior to the adoption of the Statutes of Arkansas by this provision of the Act of Congress.

In the case of *Appollos et al.* v. *Brady et al.*, 1 C. C. A. 299, the Circuit Court of Appeals for the Eighth Circuit, again stated that they would follow the construction given to the Arkansas law by the Supreme Court of the State of Arkansas. Thus it was firmly established that the proper construction to be given to any of the provisions extended by this Act of Congress was the construction and interpretation previously given by the Supreme Court of the State of Arkansas.

The Supreme Court of the State of Oklahoma, in the case of *National Live Stock Commission Company* v. *Taliaferro*, 20 Okla. 177, applied this rule after an extended consideration of the principle. It is also a generally accepted canon for construction of acts adopted from other states.

—*Capital Traction Company* v. *Hoff*, 174 U. S. 1;

*Inland, etc., Coasting Co.* v. *Hall*, 124 U. S. 121.

If this rule was only applied to the case at bar, the decision of the Supreme Court of the state ought to be reversed. The Supreme Court of the state had held that section 3 of article 1 of Mansfield's Digest providing that all of the estate of the deceased of under $300.00 should be distributed to the widow, etc., was construed by the court, not to

apply to the homestead of the deceased. Therefore if this section was given the same construction as has been given it by Arkansas it would not have been enforced in the Indian Territory, so far as the homestead is concerned.

We therefore insist that this section of the Mansfield Digest was never extended over the Indian Territory, because it was not in force in Arkansas, and if extended over the Indian Territory, would be subject to the interpretation and construction given it by the Supreme Court of the state, which had uniformly held that the same did not apply to the homestead of the deceased. And as all of the courts found the deceased died in the possession of the property, and had, prior to his death for more than one year lived with his widow upon the property, and that the same was his homestead and the order of the court found at page 34 of the record was without force and therefore the Supreme Court having misapplied the law with reference to the inheritance of the homestead, we therefore insist that the case ought to be reversed and judgment entered in this court for the plaintiff in error.

## III.

**When the trial court reverses the order of the Master in excluding evidence, it should order the cause re-referred or open the case for admitting such evidence, and affording the adverse party the opportunity of introducing explaining or rebuttal evidence.**

The fifth assignment of error is based upon the action of the trial court in considering a certain order made by the District Court of the Indian Territory sitting in probate, which order is found on page 34 of the record, and is directed to the principle of law stated in the first paragraph of the syllabus. The master in chancery had excluded this order and it had gone up with the exceptions filed by the defendant, with the report to the trial court. The court thereupon decided that the master had erred in excluding it and considered this order as a part of the record without opening the case to admit it or re-referring it for admission, and thereby precluded the plaintiff from introducing any evidence of explanation or rebuttal.

The record discloses that this order was in fact never offered in evidence. Pages 34 and 35 give all the proceedings with reference to this order. The following appears on an examination of this record:

> "By the Master: Case closed, with the exception of a certified copy of order in probate case of the estate of Squire Saunders, which it is agreed by Judge Thomas shall be introduced

subject to his objection when he has seen it, and that made, closes the case.

Mr. Thomas: Plaintiff objects to the introduction and consideration of the certified copy of the order of the probate court in the matter of the estate of Squire Saunders, deceased, for the reason that said order related exclusively to the personal estate of Squire Saunders and not to real estate, and therefore is incompetent and inadmissible in this action for the partition of real estate."

Then follows a copy of the order, and on page 35 appears the following:

"The Master: Objection sustained. Exception by defendant. Case closed. The foregoing testimony, together with the exhibits hereto attached, was all the evidence offered in this case.

CLARK J. TIDEL,
*Master in Chancery.*"

It would thus appear that this order was not introduced before the referee, and no offer of it was ever made in the trial court. On page 40 of the record appears the proceedings had in the District Court. Said proceedings are as follows:

"And thereafter, to-wit, on Friday, the 16th day of July, 1909, the same being one of the days of the regular May, 1909, term of the District Court for the Third Judicial District of Muskogee County, Oklahoma, Honorable John H. King, Judge, presiding, the issues in this case having been fully joined, this cause comes on for hearing upon the report of the

*Master* in Chancery heretofore filed herein. Both parties announced ready for trial and the court having heard the argument of counsel takes the matter under advisement.

And thereafter, to-wit, on Friday, the 30th day of July, 1909, the same being one of the days of the regular May 1909 term of the District Court for the Third Judicial District of Muskogee County, Oklahoma, the Honorable John H. King, Judge, presiding, the court having heretofore heard the argument of counsel herein, now being well and sufficiently advised in the premises doth render decree."

Then follows the finding of the court and the decree rendered, following which appears the motion for new trial.

It is our contention primarily that this order that seemed to be the basis of the court's decision, was never introduced in evidence and never became a part of the record. The master in chancery rejected the offer and made his findings without it. If the parties were aggrieved at the exclusion of it, it was their duty to except and present their objections to the District Court, and if sustained, it became the duty of the court to either refer it to the master or re-open the case.

In the case of *Matter of Friend*, 23 Misc. 236, 50 N. Y. Sup. 954, the Supreme Court of New York held that where a referee had erroneously excluded competent and relevant evidence, it was the duty of the court to refer the cause back to him for the purpose of receiving such evidence.

We think it may be said to be a universal rule that on hearings of exceptions to the master's report, the court reviews the evidence reported by the master, and no additional evidence will be heard, unless in exceptional cases where good reason is shown for the introduction of such additional evidence.

—17 Enc. of Pl. & Pr. 1057, and the cases there cited;

*Central Trust Co.* v. *Ga. Pac. Ry.*, 83 Fed. 336.

Without, however, entering into any extended argument as to whether the court would admit other evidence or not, it certainly must be agreed that in order for the court to consider the evidence excluded by the master, at some time and place such evidence must be offered and admitted. This order had been expressly excluded by the referee and no application was ever made to the court to re-open the case and permit the said order to be introduced or to refer it again to the master to admit such evidence. It is true that the defendant had excepted to the action of the court in excluding it, and attempted to preserve such exceptions in a bill of exceptions, but exceptions to the act of the master could not result, even if sustained, in introducing such order. We take it that proper practice would require, after the exception was sustained, that the case should either be referred again to the master to admit such order and such rebuttal evidence as might have been necessitated by its admission or the reopening of the case by the dis-

trict judge, and the admission of such order and such rebuttal evidence as the parties desired. The force of this objection could not be stronger presented than appears from the record in this case. If this order had been received in evidence, the plaintiffs, to escape its force would have been required to have either shown, *first* that the estate exceeded more than $300.00 in value; *second*, that this property was the homestead, and therefore, not affected by the order; or *third*, that said order was invalid, either because the court did not have jurisdiction of the parties, or did not make such order; or *fourth* that there were heirs at the time of the death of the claimant.

We think that the best discussion of this rule may be found in the case of *Brueggestradt* v. *Ludwig*, 184 Ill. 24, where the court expressly passed upon the very question involved in this case. In the syllabus, the court say:

> "The proper practice for the chancellor on sustaining exceptions to rulings of the master rejecting testimony is, as is contemplated by the rules of the Superior Court, to refer the cause to the master with direction to admit the testimony when the witness could be cross examined."

In the decision the court said:

> "We are of the opinion that the chancellor did not err in sustaining the exception of appellees to the rulings of the master in rejecting the testimony offered by them on November 30, 1897, because the copies of entries and records then offered related to the dealings between ap-

pellant and Hearther prior to October 22, 1894, which, if they were correct copies, as was offered to be shown by the witness Cole, they were competent and material evidence on the question as to whether, prior to that date, appellant and Hearther had intimate business relations toward each other; that Hearther was indebted to appellant in a large amount as far back as May 18, 1893; that appellant knew that Hearther was habitually dishonest; and whether, on October 22, 1894, appellant caused to be released certain incumbrances on Hearther's real estate, then owned, or which had been owned by him. But, having so ruled, we think the proper practice to have been pursued, was to re-refer the cause to the master, with direction to admit the testimony of the witness, Cole, when he could have been cross examined, *and appellant would have had no opportunity, if he so desired, to offer evidence to disprove Cole's testimony, or to explain, if he could, the several entries and records.*"

This Illinois case is peculiarly applicable to the case at bar, because, as we remember, the common law practice is exclusively in force in Illinois, and that the Statutes of Arkansas providing for the appointment of a master in chancery, incorporated the common law provisions with reference to such report.

In this last case of *Brueggestradt* v. *Ludwig*, copies of records were offered in evidence, and a witness by the name of Cole was called to properly identify them. An objection was sustained to the testimony of Cole, and the records excluded. The dis-

trict court held that the master improperly excluded them, and considered them in evidence. On appeal to the Court of Appeals, the decision of the district judge was reversed, and on further appeal to the Supreme Court, the judgment of the appellate court was affirmed in reversing the trial court. The reversal was had upon the theory that the trial court erroneously considered the evidence which had been rejected by the master. While the master had acted erroneously in rejecting the evidence, it became the duty of the trial court to refer again the case to the master, with directions to admit such evidence and allow the adverse party to offer evidence to disprove Cole's testimony, or to explain, if he could, the several entries and records. This would have been the proper practice in this case, and this court, in the case at bar, as well as on the trial, erroneously considered such evidence rejected by the master, and entering a judgment upon such excluded evidence.

This rule was followed in *Wall* v. *Stapleton*, 177 Ill. 357, in which the court said:

> "It is insisted it was error for the chancellor to hear additional evidence in open court after the coming in of the master's report. It has been frequently held that, where a case is referred to a master to take testimony and state his conclusions, it then becomes necessary that all the evidence shall be heard before the master, as he could not state his conclusions on only a part of the evidence. Where a reference is made to a master to hear evidence and state conclusions, and in the judgment of the chancellor it is

necessary that further evidence be considered, it is the proper practice to again refer the cause to the master, with directions to take further testimony on the particular points on which the chancellor desires to have further evidence. The chancellor in this case required the defendant in error to introduce certain testimony as additional evidence in open court, after the coming in of the master's report. This evidence was merely of a cumulative character, and did not in any manner change the conclusion, reached as the result of the master's report, for the decree entered by the chancellor was the same as that recommended by the master before the coming in of this evidence. When the court required the defendant in error to introduce this testimony, he did not deprive the plaintiffs in error of any right to introduce evidence to rebut it; and the evidence thus introduced, being merely cumulative, is not cause for a reversal, inasmuch as the decree was clearly right on the evidence before the master, aside from this additional cumulative evidence."

As the report of the master was affirmed and was supported by other competent evidence the court treated the error as harmless. The same rule is announced in the following cases:

*Severance* v. *Hilton*, 32 N. H. 289;
*Bellows* v. *Ingram*, 2 Vt. 575.

In the case of *American Hoist & Derrick Co.* v. *Hall*, 208 Ill. 597, this same principle was affirmed, the court using the following language:

"It is further insisted on behalf of appellant that the court below erred in refusing to ad-

mit the testimony of a witness named Waixel at the hearing on the master's report. The cause had been referred to the master, and he had taken the evidence and reported the same, together with his conclusions of law and fact. Exceptions had been filed to that report, and while they were under consideration by the chancellor the testimony of the witness was offered. We have held that, as a general rule, it is error for the court, under such circumstances, to hear evidence not considered by the master."

In the case of *Guaranty Bond, Loan & Savings Co.* v. *Edwards,* 104 S. W. 642, the Court of Appeals of the Indian Territory, reviewed the Illinois cases that we have cited, and approved the rule stated therein. This case was affirmed by the Circuit Court of Appeals in 164 Fed. page 810.

It will be noted that the court in the last case quoted from the *Brueggerstradt* v. *Ludwig* case, and approved the principle therein announced.

In conclusion of this question, we think that the Statute of Arkansas itself conclusively shows that the court had no right to treat such rejected evidence as a part of the record and enter judgment thereon.

Section 5269 of Mansfield's Digest permits either party to except to the admission or exclusion of any evidence, and requires the master to state the particulars of the exception, in his report.

Section 5273 provides that the court could allow exceptions to a report whether the master admitted incompetent testimony, and section 5274 provided

that when the exceptions are allowed the court may refer the report to the master again with such instructions as may be necessary.

While the record in the District Court does not disclose that the exceptions were allowed, in express terms, the only proper conclusion to be drawn from the order of the court, is that the same were allowed, and under the express terms of section 5274 of Mansfield's Digest, it became the duty of the court to again refer the case to the master for further report, with instructions to admit such evidence, and such other competent evidence in rebuttal as might be proper.

We again repeat that this is not a technical but an extremely important question to the plaintiffs in error. If the cause had been referred to the master, the plaintiffs would have been permitted to offer evidence showing that the order offered was not the order of the court, or any fact which might defeat the operation of the order.

As stated in the authorities cited, and as we believe, generally stated by the commentaries on this subject, the reason for re-referring matters of this kind, to the master on sustaining exceptions to the exclusion of testimony, is to accord the opposite party the opportunity to introduce evidence in rebuttal thereon or to otherwise explain the same.

While, as we have stated here, it seems to be the universal rule, both under the common law and which

is expressly recognized by Statute in Arkansas, that upon sustaining exceptions to a rule of the master excluding testimony, the cause should be re-referred, with instructions to admit the same, and to permit the opposite party to cross examine thereon, and to introduce evidence in rebuttal, and that this should all be done on re-reference to the master. Still, if it could be held that the court should without referring it again to the master, admit such evidence, it will certainly be conceded that he ought to open the case for that purpose, to the end that the evidence might be formally and properly introduced, and to accord to the opposite party an opportunity to cross examine in relation thereto, and to introduce evidence in rebuttal thereof.

The plaintiffs in error in this case had no opportunity to introduce evidence in rebuttal of this order, or to explain the same or to cross examine in relation thereto, for the reason that as the record stood, when the evidence was closed, there was nothing to rebut. The order was not in evidence, the master having sustained the objection thereto, and it was not either necessary or competent for plaintiffs to offer any evidence in explanation thereof. Now when this case got to the District Court and the exceptions to the rule of the master on this order were sustained, the court by merely considering the same as having been received, and rendering judgment thereon, wholly deprived the plaintiffs in error of offering any evidence whatever in explanation or impeachment of this order.

This rule is undoubtedly founded on reason and justice, and any other rule that should be adopted would work a great hardship on litigants, and we have been unable to find anything in the adjudicated cases that would sustain it.

We therefore, insist that the decision of the Supreme Court Commission was wrong in treating this order as a part of the record of the case, and basing the affirmance of the case upon the purported order. Excluding this purported order, the plaintiffs were unquestionably entitled to recover and the case should be reversed. The plaintiffs are proven to be the heirs of Squire Saunders, and the property in controversy was a part of his estate and passed to them as such heirs. Therefore, we insist that upon this record, with the purported order excluded as should be done, the plaintiffs have proven a case and this cause should be reversed.

Respectfully submitted,

B. B. Blakeney,
James H. Maxey,
*Attorneys for Plaintiffs in Error.*

## SUPPLEMENT *to* BRIEF.

In our original brief filed in this case we presented two primary propositions:

*First,* that under the Acts of Congress an allotment in the name of a deceased Indian vested the title in his heirs and the provision of the Creek Treaty providing that title should in like manner and with like effect issue to town sites, gave the same force and effect to the patent issued in the name of deceased applicants for town property. In reaching this conclusion we urge that section 5 of the Act of Congress of April 26, 1906 (34 Stat. L. 137), and section 32 of the Act of Congress of June 25, 1910 (36 Stat. L. 855-863), would be presumed to apply to town sites as well as to allotted lands.

Our *Second* proposition was that only the laws of Arkansas that were in force in Arkansas were extended over the Indian Territory by the Act of Congress.

### I.

Since writing the original brief we have discovered that our first contention is conclusively established by an examination of the history of sec-

tion 32 in the Act of June 25, 1910 (36 Stat. L. 855). An examination of the files of the Department of the Interior disclosed that on the 22nd of May, 1910, L. S. Dolman, an attorney at Ardmore, wrote to Mr. Frank Pierce, Assistant Secretary of the Interior, a letter in which he stated that he enclosed an opinion which he had given, showing that a conveyance by the principal chief of the Choctaw Nation of lots in the townsite of Ardmore, made and delivered to the applicant after his death, did not pass title to his heirs. This opinion was submitted with the letter and is also a part of the files of the Department of the Interior.

On June 13, 1910, Mr. Frank Pierce, first assistant to the Secretary of the Interior, answered the letter, in which he stated that he would submit the matter to Congress with recommendation for further legislation, if he determined it proper and necessary, and on the same date, June 13, 1910, sent the following letter to the Commissioner of Indian Affairs:

"Department of the Interior,
Washington, June 13, 1910.

*Commissioner of Indian Affairs:*

SIR: Enclosed is a letter from Mr. L. S. Dolman of Ardmore, Okla., enclosing copy of an opinion written by him in passing upon title to a lot in Ardmore. Mr. Dolman holds that because the deed to this lot was executed by the governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation and approved

by the Secretary of the Interior after the death of the purchaser, it was ineffective to convey title to the grantee, and that the title to said lot still remains in the Indian Nation. He intimated that the title to a large number of lots in towns of the Five Civilized Tribes is in like unfortunate condition. It is possible that legislation is demanded in respect to this matter. You will consider it to determine whether we should request further legislation or whether such defects, if they exist, may be cured by further deed conveying lots in this condition to those entitled thereto, calling upon the officers in the field for report if that be found necessary.

Very respectfully,

FRANK PIERCE,

*1st Asst. Secy.*"

On the 21st of June, 1910, Mr. R. A. Ballinger, Secretary of the Interior, sent the following communication to the Honorable Moses E. Clapp, Chairman of the Committee on Indian Affairs:

"Department of the Interior,

Item to be inserted in H. R. 24992 pending in Senate. June 21, 1910.

HON. MOSES E. CLAPP,

*Chmn. Committee on Indian Affairs,*

United States Senate.

SIR: I have the honor to suggest that the following item be inserted as an amendment to the H. R. 24992 now pending in the Senate as an urgent and necessary item to relieve a complication of title from a contingency arising in

the patenting of the Indian lands of the Five Civilized Tribes in Oklahoma. The attention of the Department has been called to instances where deeds to town lots sold having been executed by the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation and without the death of the purchaser being made known to the Department, have been approved by the Secretary of the Interior when the purchaser in whose name the deed was issued was dead and the patent ineffective to carry the title to the lot to the purchaser, but the title remained in the tribe from which it was bought, in order to convey a clear title to the lot sold and remove any cloud by the approval and recordation of a conveyance running in the name of the deceased person. It is believed that the following item if enacted into law will avoid the contingency which has already occurred. Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued in pursuance of any tribal agreement or Act of Congress to a person who has died or who hereafter died before the approval of such deed the title to the land designated therein shall inure to and become vested in the heirs, devisees or assigns of such deceased grantee as if the deed had been issued to the deceased grantee during life or in his name.

The above provision is similar in terms to Sec. 2448 R. S. U. S. relating to the issuance of patents to public lands of the United States. Correspondence on the subject is enclosed.

Very respectfully,

R. A. Ballinger,

Secy."

On July 23, 1913, Mr. C. F. Hauke, Second Assistant Secretary of the Interior sent the following communication to Mr. Dickson:

"Department of the Interior,
Office of Indian Affairs,
Lands in Tribal Lands.
Washington, July 23, 1913.

L. B. Dickson, Esq.,
Athens, Ohio.,

Sir: In response to your letter of May 21, 1913, requesting that legislation be enacted by Congress to cure defect of title where a person died before the approval of the deed issued to him, you are advised that Congress by the act approved June 25, 1913, provided in Sec. 32 as follows:

Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued in pursuance of any tribal agreement or Act of Congress to a person who had died or who hereafter died before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assigns of said deceased grantee as if the deed had issued to the deceased grantee during life.

It is believed that the above provision will cure the defect of title complained of.

Very respectfully,

C. F. Hauke,
Second Assistant Secretary."

In the report of the Conference Committee submitted by the Managers on the part of the House, appears the following:

*Statement of the Managers on the part of the House:*

"The Managers on the part of the House of the Conference on Disagreeing Votes of the two Houses on the amendment of the Senate to the Bill (H. R. 24992) to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceaesd Indians, for the leasing of allotments, and for other purposes, submit the following written statement in explanation of the effect of the act agreed upon and recommended in the accompanying report as to said amendment.

Sections 25, 26, 27, 28, 29, 30, 31 and 32 are sound contributions to the act and are as follows:

* * * * * * * * *

These sections either had the approval of or were adopted at the instance or suggestions by the Secretary of the Interior.

CHAS. H. BURKE, P. P. CAMPBELL,
JOHN H. STEPHENS,
*Mgrs. on the part of the House."*

These documents show that section 32 was adopted expressly for the purpose of vesting title in the heirs of the deceased applicants of town lots, when such applicants had died prior to the issuance of patent; therefore we submit in addition to the argument formerly made, that any provision of the Arkansas statute attempting to vest title in others than the heirs would be in conflict with the provisions of these Acts of Congress and inoperative.

It cannot be contended that section 3 of the Administration Act attempting to give to the wife all of the property, made the wife an heir and therefore that she would take the whole as an heir, because section 6 of the Supplemental Creek Agreement (32 Stat. L. 500) provides the descent and distribution of land and moneys provided by the Original Agreement to be in accordance with chapter 49 of Mansfield's Digest of the Statute of Arkansas, now in force in the Indian Territory. This provision did not even extend over the Mansfield Digest, but only provided that the provisions of chapter 49 then in force in the Indian Territory, should govern descent and distribution. Chapter 49 gave the wife or widow, only a dower interest, vesting the fee in the children; therefore in no sense was the wife or widow an heir.

## II.

The second proposition presented in our original brief, that a statute not in force in Arkansas was not extended over the Indian Territory has been conclusively answered by the recent opinion rendered by Mr. Justice VAN DEVANTER, and reported in 33 Sup. Ct. Rep. 119, in the case of *Martha Adkins* v. *Henry C. Arnold*, decided at the October term, December 14, 1914:

> "Assuming that the two sections are inconsistent, as claimed, we think Sec. 4621 is controlling. While both were embodied in the Ar-

kansas compilation known as Mansfield's Digest of 1884, section 4621 was a later enactment than section 648, and superseded the latter in so far as they were in conflict. This was settled by the Supreme Court of the state before either section was put in force in the Indian Territory (*Bryan* v. *Winburn*, 43 Ark. 28; *Stone* v. *Stone*, 43 Ark. 160; *Criscoe* v. *Hambrick*, 47 Ark. 235, 1 S. W. 150), and we think Congress intended they should have the same force and meaning there that they had in Arkansas. See *Robinson* v. *Belt*, 187 U. S. 41, 47, 48, 47 L. ed. 65, 68, 69, 23 Sup. Ct. Rep. 16. Although put in force in the Indian Territory by different acts, they were not adopted as if they were unrelated, but as parts of a single system of laws whose relative operation, as determined by the Supreme Court of Arkansas, had become an integral part of them. *Pennock* v. *Dialogue*, 2 Pet. 1, 18, 7 L. ed. 327, 333; *Cathcart* v. *Robinson*, 5 Pet. 264, 280, 8 L. ed. 120, 126."

Respectfully submitted,

B. B. Blakeney,
James H. Maxey,
*Attorneys for Plaintiff in Error.*